COMMENTARIES

ON

EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

ENGLAND AND AMERICA.

BY JOSEPH STORY, LL. D.

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,
AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

"Curiosity is created to supply the Law, not to subvert the Law."—LORD BACON.

"Hæc [illegible] quæ [illegible] sunt exigere, aut ex simili, aut ex iis, quæ [illegible] videntur, attendere, et ea eligere, potentumlo unum quemque eorum [illegible], quæ [illegible]."—CIC. De Invent. Lib. 2, cap. 22.

SIXTH EDITION

REVISED, CORRECTED, AND ENLARGED

IN TWO VOLUMES

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TO THE SIXTH EDITION.

In the preparation of this Edition, the late English and American Reports have been carefully searched, and so far as came within the legitimate province of an *Editor*, the cases on this branch of the law have been added to the original work. In some instances new sections have been written, all of which are included in brackets, in the same manner as the additions of former Editions. Nearly one thousand cases have been added, either as cumulative, or as establishing new applications of principles.

EDMUND H. BENNETT.

Boston, September, 1853.

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TO THE FIFTH EDITION.

The present edition of the Commentaries on Equity Jurisprudence contains the illustrations and authorities furnished by the cases which have been decided in England and America since the publication of the fourth edition. With the view of preserving the original text, as left by the author, such additional words or propositions as are now introduced, are marked by brackets, thus [ ].

CHARLES SUMNER

Boston, January, 1849.

ADVERTISEMENT

TO THE FOURTH EDITION.

The present edition of the Commentaries on Equity Jurisprudence was prepared for the press by the late author, and will be found to be considerably enlarged from the former editions, both in the text and notes. His thorough revision and correction of the whole work has left little else to be done than to add such illustrations and citations as have grown out of the very recent cases.

W. W. STORY.

Boston, April, 1846.

TO THE HONORABLE

WILLIAM PRESCOTT, LL. D.

SIR,

IT affords me sincere gratification to be allowed to dedicate this work to you, upon your retirement from the Bar, of which you have been so long a distinguished ornament. More than one third of a century has elapsed, since, upon my first admission to practice, I had the honor of forming an acquaintance with you, which has ripened into a degree of friendship, of which I may be truly proud. It has been my good fortune, through the whole intermediate period, to have been a witness of your professional labors; — labors equally remarkable for the eminent ability, untiring research, profound learning, and unsullied dignity, with which they were accompanied. They have brought with them the just reward due to a life of consistent principles, and public spirit, and private virtue, in the universal confidence and respect, which have followed you in your retreat from the active scenes of business. This is a silent but expressive praise, whose true value is not easily over-estimated. I trust, that you may live many years to enjoy it, for the reason so finely touched by one of the great Jurists of Antiquity; Quia Conscientia bene actæ vitæ, multorumque benefactorum Recordatio jucundissima est.

JOSEPH STORY.

CAMBRIDGE, December, 1835.

PREFACE

THE present work embraces another portion of the labors, devolved upon me by the Founder of the Dane Professorship of Law in Harvard University. In submitting it to the Profession, it is impossible for me not to feel great diffidence and solicitude, as to its merits, as well as to its reception by the public. The subject is one of such vast variety and extent, that it would seem to require a long life of labor to do more than to bring together some of the more general elements of the System of Equity Jurisprudence, as administered in England and America. In many branches of this most complicated System, composed (as it is) partly of the principles of natural law, and partly of artificial modifications of those principles, the ramifications are almost infinitely diversified; and the Sources, as well as the Extent of these branches, are often obscure and ill-defined, and sometimes incapable of any exact development. I have endeavored to collect together, as far as my own imperfect studies would admit, the more general principles belonging to the System in those branches, which are of daily use and practical importance. My main object has been to trace out and define the various sources and limits of Equity Jurisdiction, as far as they may be ascertained by a careful examination of the Authorities, and a close Analysis of each distinct ground of that Jurisdiction, as it has been practically expounded and applied in different ages. Another object has been to incorporate into the text some of the leading doctrines which guide

and govern Courts of Equity in the exercise of their jurisdiction; and especially in those cases, where the doctrines are peculiar to those Courts, or are applied in a manner unknown to the Courts of Common Law. In many cases I have endeavored to show the reasons, upon which these doctrines are founded; and to illustrate them by principles drawn from foreign jurisprudence, as well as from the Roman Civil Law. Of course the reader will not expect to find in these Commentaries a minute, or even a general survey of all the doctrines belonging to any one branch of Equity Jurisprudence; but such expositions only, as may most fully explain the Nature and Limits of Equity Jurisdiction. In order to accomplish even this task in any suitable manner, it has become necessary to bestow a degree of labor in the examination and comparison of authorities, from which many jurists would shrink, and which will scarcely be suspected by those, who may consult the work only for occasional exigencies. It will be readily seen that the same train of remark, and sometimes the same illustrations are repeated in different places. As the work is designed for elementary instruction, this course seemed indispensable to escape from the inconvenience of perpetual references to other passages, where the same subject is treated under other aspects.

The work is divided into three great heads. First, The Concurrent Jurisdiction of Courts of Equity; secondly, the Exclusive Jurisdiction; and thirdly, the Auxiliary or Assistant Jurisdiction. The Concurrent Jurisdiction is again subdivided into two branches; the one, where the subject-matter constitutes the principal (though rarely the sole) ground of the Jurisdiction; the other, where the peculiar remedies administered in Equity constitute the principal (though not always the sole) ground of Jurisdiction. The present volume embraces the first only of these branches of Concurrent Jurisdiction. The remaining subjects will be fully discussed in the succeeding volume. I hope also to find leisure to present, as a fit conclusion of these Commentaries, a general review of the doctrines of

Equity Pleading, and of the Course of Practice in Equity Proceedings.

In dismissing the work to the indulgent consideration of the profession, I venture to hope that it will not be found, that more has been promised than is performed; and that, if much has been omitted, something will yet be found to lighten the labors of the inquisitive, if not to supply the wants of the learned.

CAMBRIDGE, Mass., December, 1835.

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COMMENTARIES

ON

EQUITY JURISPRUDENCE.

COMMENTARIES

ON

EQUITY JURISPRUDENCE.

CHAPTER I.

THE TRUE NATURE AND CHARACTER OF EQUITY JURISPRUDENCE.

§ 1. In treating of the subject of Equity, it is material to distinguish the various senses, in which that word is used. For it cannot be disguised, that an imperfect notion of what, in England, constitutes Equity Jurisprudence, is not only common among those who are not bred to the profession, but that it has often led to mistakes and confusion in professional treatises on the subject. In the most general sense, we are accustomed to call that Equity, which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex æquo et bono*. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects. *Justitia est constans et perpetua voluntas jus suum cuique tribuendi. Jus pluribus modis dicitur. Uno modo, cum id quod semper æquum et bonum, jus dicitur; ut est jus naturale. Juris præcepta sunt hæc; honeste*

vivere, alterum non lædere, suum cuique tribuere.[1] And the word *jus* is used in the same sense in the Roman law, when it is declared, that *jus est ars boni et æqui*,[2] where it means, what we are accustomed to call, jurisprudence.[3]

§ 2. Now, it would be a great mistake to suppose that Equity, as administered in England or America, embraced a jurisdiction so wide and extensive, as that which arises from the principles of natural justice above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters *ex æquo et bono*, never affected so bold a design.[4] On the contrary, it left many matters of natural justice wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness, or even to positive engagements of

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[1] Dig. Lib. 1, tit. 1, l. 10, 11.

[2] Dig. Lib. 1, tit. 1, l. 1.

[3] Grotius, after referring to the Greek word, used to signify Equity, says, Latinis autem æqui prudentia vertitur, quæ se ita ad æquitatem habet, ut jurisprudentia ad justitiam. Grotius de Æquitate, ch. 1, § 4. This distinction is more refined, than solid, as the citation in the text shows. See also Taylor's Elements of the Civil Law, p. 90 to 98. Cicero. Topic. § 2; II. ad Heren. 13; III. ad Heren. 2. Bracton has referred to the various senses, in which *jus* is used. Item, (says he,) jus quandoque ponitur pro jure naturali quod semper bonum et æquum est; quandoque pro jure civili tantum; quandoque pro jure prætorio tantum; quandoque pro eo tantum, quod competit ex sententiâ. Bracton, Lib. 1, ch. 4, p. 3. See Dr. Taylor's Definition of *lex* and *jus*. Elem. Civ. Law, p. 147, 148; Id. 178; Id. 40 to 43; Id. 55, 56; Id. 91.

[4] See Heinecc. Hist. Edit. L. 1, ch. 6; De Edictis Prætorum, § 7, 8, 9, 10, 11, 12; Id. § 18, 21 to 30; De Lolme on Eng. Const. B. 1, ch. 11.

parties, where they are not founded in what constitutes a meritorious consideration.[1] Thus, it is well known, that in the Roman law, as well as in the common law, there are many pacts, or promises of parties, (*nude pacts,*) which produce no legal obligation, capable of enforcement *in foro externo;* but which are left to be disposed of *in foro conscientiæ* only.[2] *Cum nulla subest causa propter conventionem, hic constat non posse constitui obligationem. Igitur nuda pactio obligationem non parit.*[3] And again. *Qui autem promisit sine causa, condicere quantitatem non potest, quam non dedit, sed ipsam obligationem.*[4] And hence the settled distinction, in that law, between natural obligations, upon which no action lay, but which were merely binding in conscience, and civil obligations, which gave origin to actions.[5] The latter were sometimes called just, because of their perfect obligation in a civil sense; the former merely equitable, because of their imperfect obligation. *Et justum appellatur,* (says Wolfius) *quicquid fit secundem jus perfectum alterius; æquum vero quod secundum imperfectum.*[6] Cicero has alluded to the double sense of the word *Equity,* in this very connection. *Æquitatis,* (says he,) *autem vis est duplex; cujus altera directi, et veri, et justi, ut dicitur, æqui et boni ratione defenditur; altera ad vicissitudinem referendæ gratiæ pertinet; quod in beneficio gratia, in injuria ultio*

[1] Ayliffe, Pand. B. 4, tit. 1, p. 420, &c.; 1 Kames, Equity, Introd. p. 3; Francis, Maxims, Introd. p. 5, 6, 7.

[2] Ayliffe, Pand. B. 4, tit. 2, p. 424, 425; 1 Domat, Civ. Law, B. 1, tit. 1, § 5, art. 1, 6, 9, 13.

[3] Dig. Lib. 2, tit. 14, l. 7, § 4.

[4] Dig. Lib. 12, tit. 7, l. 1.

[5] Ayliffe, Pand. B. 4, tit. 1, p. 420, 421.

[6] Wolff. Instit. Jur. Nat. et Gent. P. 1, ch. 3, § 83.

nominatur.[1] It is scarcely necessary to add, that it is not in this latter sense, any more than in the broad and general sense above stated, which Ayliffe has, with great propriety, denominated *Natural Equity*, because it depends on and is supported by natural reason, that Equity is spoken of, as a branch of English Jurisprudence. The latter falls appropriately under the head of *Civil* Equity, as defined by the same author, being deduced from and governed by such civil maxims, as are adopted by any particular state or community.[2]

§ 3. But there is a more limited sense in which the term is often used, and which has the sanction of jurists in ancient, as well as in modern times, and belongs to the language of common life, as well as to that of juridical discussions. The sense, here alluded to, is that, in which it is used in contradistinction to strict law, or *strictum et summum jus*. Thus, Aristotle has defined the very nature of Equity to be the correction of the law, wherein it is defective by reason of its universality.[3] The same sense is repeatedly recognized in the Pandects. *In omnibus quidem, maxime tamen in jure, æquitas spectanda sit. Quoticns æquitas,*

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[1] Cic. Orat. Part. § 37.

[2] Ayliffe, Pand. B. 1. tit. 7, p. 37.

[3] Arist. Ethic. Nicom. L. 5, ch. 14, cited 1 Wooddes. Lect. (Lect. vii.) p. 193; Taylor, Elem. of Civ. Law, p. 91, 92, 93; Francis, Maxims, 3; 1 Fonbl. Eq. B. 1, § 2, p. 5, note (*e*). — Cicero, speaking of Galba, says, that he was accustomed, Multa pro æquitate contra jus dicere. Cic. de Oratore, Lib. 1, § 57. See also other passages, cited in Taylor's Elem. of the Civ. Law, 90, 91. Bracton defines *equity*, as contradistinguished from law, (*jus*,) thus; Æquitas autem est rerum convenientia, quæ in paribus causis paria desiderat jura, et omnia bene coæquiparat; et dicitur æquitas, quasi æqualitas. Bracton, Lib. 1, ch. 4, § 5, p. 3.

desiderii naturalis ratio, aut dubitatio juris moratur, justis decretis res temperanda. Placuit in omnibus rebus præcipuam esse justitiæ æquitatisque, quam stricti juris rationem.[1] Grotius and Pufendorf have both adopted the definition of Aristotle; and it has found its way, with approbation, into the treatises of most of the modern authors, who have discussed the subject.[2]

§ 4. In the Roman jurisprudence we may see many traces of this doctrine, applied to the purpose of supplying the defects of the customary law, as well as to correct and measure the interpretation of the written and positive code. Domat, accordingly, lays it down, as a general principle of the civil law, that, if any case should happen, which is not regulated by some express or written law, it should have for a law the natural principles of Equity, which is the universal law,

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[1] Dig. Lib. 50, tit. 17, l. 85, 90; Cod. Lib. 3, tit. 1, l. 8.

[2] Grotius de Æquitate, ch. 1, § 3; Pufend. Law of Nature and Nat. B. 5, ch, 12, § 21, and Barbeyrac's note (1); 1 Black. Comm. 61; 1 Wooddes. Lect. vii. p. 193; Bac. De Aug. Scient. Lib. 8, ch. 3, Aphor. 32, 35, 45. — Grotius says: Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, quo lex propter universalitatem deficit. Grotius de Æquitate, ch. 1, § 2. Æquum est id ipsim, quo lex corrigitur. Id. Dr. Taylor has with great force paraphrased the language of Aristotle. That part of unwritten law, says he, which is called *Equity* or τὸ Ἐπιεικες, is a species of justice distinct from what is written. It must happen either against the design and inclination of the lawgiver, or with his consent In the former case, for instance, when several particular facts must escape his knowledge; in the other, when he may be apprised of them, indeed, but by reason of their variety is not willing to recite them. For, if a case admits of an infinite variety of circumstances, and a law must be made, that law must be conceived in general terms. Taylor, Elem. Civ. Law, 92. And of this infirmity in all laws, the Pandects give open testimony. Non possunt omnes articuli singillatim aut legibus, aut senatusconsultis comprehendi; sed cum in aliqua causa sententia eorum manifesta est, is qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet. Dig. L. 1, tit. 3, l. 12; Id. l. 10.

extending to every thing.[1] And for this he founds himself upon certain texts in the Pandects, which present the formulary in a very imposing generality. *Hœc Æquitas suggerit, etsi jure deficiamur*, is the reason given for allowing one person to restore a bank or dam in the lands of another, which may be useful to him, and not injurious to the other.[2]

§ 5. The jurisdiction of the Prætor doubtless had its origin in this application of Equity, as contradistinguished from mere law. *Jus autem civile*, (say the Pandects,) *est, quod ex legibus, plebiscitis, senatus consultis, decretis principum, auctoritate prudentium venit. Jus prætorium est, quod Prætores introduxerunt, adjuvandi, vel supplendi, vel corrigendi juris civilis gratiâ, propter utilitatem publicam; quod et honorarium dicitur, ad honorem prætorum sic nominatum.*[3] But, broad and general as this language is, we should be greatly deceived, if it were to be supposed, that even the Prætor's power ex-

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[1] Domat, Prel. Book, tit. 1, § 1, art. 23. See also Ayliffe, Pand. B. 1, tit. 7, p. 38.

[2] Dig. Lib. 39, tit. 3, l. 2, § 5. — Domat cites other texts not perhaps quite so stringent; such as Dig. Lib. 27, tit. 1, l. 13, § 7; Id. Lib. 47, tit. 20, l. 7. Dr. Taylor has given many texts to the same purpose. Elem. Civ. Law, p. 90, 91. There was a known distinction in the Roman law on this subject. Where a right was founded in the express words of the law, the actions grounded on it were denominated Actiones Directæ; where they arose upon a benignant extension of the words of the law to other cases, not within the terms, but within what we should call the equity of the law, they were denominated Actiones Utiles. Taylor, Elem. Civ. Law, 93.

[3] Dig. Lib. 1, tit. 1, l. 7; Id. tit. 3, l. 10. — Sed et eas actiones, quæ legibus proditæ sunt, (say the Pandects,) si lex justa ac necessaria sit, supplet Prætor in eo, quod legi deest. Dig. Lib. 19, tit. 5, l. 11. Heineccius, speaking of the Prætor's authority, says: His Edictis multa innovata, adjuvandi, supplendi, corrigendi juris civilis gratia, obtentuque utilitatis publicæ. 1 Heinecc. Elem. Pand. P. 1, Lib. 1, § 42.

tended to the direct overthrow or disregard of the positive law. He was bound to stand by that law in all cases, to which it was justly applicable, according to the maxim of the Pandects, *Quod quidem perquam durum est; sed ita lex scripta est.*[1]

§ 6. But a more general way in which this sense of Equity, as contradistinguished from mere law, or *strictum jus*, is applied, is, to the interpretation and limitation of the words of positive or written laws; by construing them, not according to the letter, but according to the reason and spirit of them.[2] Mr. Justice Blackstone has alluded to this sense in his Commentaries, where he says: "From this method of interpreting laws, by the reason of them, arises, what we call Equity;"[3] and more fully in another place, where he says: "Equity, in its true and genuine meaning, is the soul and spirit of all law; positive law is construed, and rational law is

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[1] Dig. Lib. 40, tit. 9, l. 12, § 1. See also 3 Black. Comm. 430, 431; 1 Wooddes. Lect. vii. p. 192 to 200.—Dr. Taylor, (Elem. Civ. Law, p. 214,) has therefore observed, that, for this reason, this branch of the Roman Law was not reckoned as part of the jus civile scriptum by Papinian, but stands in opposition to it. And thus, as we distinguish between common law and equity, there were with that people actiones civiles et prætoriæ, et obligationes civiles, et prætoriæ. The Prætor was therefore called Custos, non conditor juris; judicia exercere potuit; jus facere non potuit; dicendi, non condendi juris protestatem habuit; juvare supplere, interpretari, mitigare jus civile potuit; mutare vel tollere non potest. The prætorian edicts are not properly law, though they may operate like law. And Cicero, speaking of contracts bonæ fidei, says, in allusion to the same jurisdiction; In his magni esse judicis statuere (præsertim come in plerisque essent judicia contraria,) quid quemque cuique præstare oporteret; that is, he should decide according to equity and conscience. Cic. de Officiis, Lib. 3, cap. 17. Dr. Taylor has, in another part of his work, gone at large into Equity and its various meanings in the civil law. Taylor, Elem. of Civil Law, 90 to 98.

[2] Plowden, Comm. p. 465, 466.

[3] 1 Black. Comm. p. 61, 62.

made by it. In this, Equity is synonymous with justice; in that, to the true and sound interpretation of the rule."[1]

§ 7. In this sense Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance.[2] It is impossible, that any code, however minute and particular, should embrace, or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them. *Neque leges neque senatusconsulta ita scribi possunt*, (says the Digest,) *ut omnes casus, qui quandoque inciderint, comprehendantur; sed sufficit ea, quæ plerunque accidunt, contineri.*[3] Every system of laws must necessarily be defective; and cases must occur, to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all. It is the office, therefore, of a judge to consider whether the antecedent rule does apply, or ought, according to the intention of the lawgiver, to apply to a given case; and if there are two rules, nearly

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[1] 3 Black. Comm. p. 429. See also Taylor, Elem. Civ. Law, p. 96, 97; Plowd. Comm. p. 465, Reporter's note.—Dr. Taylor has observed, that the great difficulty is, to distinguish between that Equity, which is required in all law whatsoever, and which makes a very important and a very necessary branch of the jus scriptum; and that equity, which is opposed to written and positive law, and stands in contradistinction to it. Taylor, Elem. Civ. Law, p. 90.

[2] See 1 Fonbl. Equity, B. 1, § [illegible] p. 24, note (*h*); Plowden, Comm. p. 465, 466.—Lord Bacon said, in his Argument on the jurisdiction of the Marches; there is no law under heaven which is not supplied with Equity; for Summum jus summa injuria; or as some have it, Summa lex summa crux. And, therefore, all nations have Equity. 4 Bac. Works, p. 274. Plowden, in his note to his Reports, dwells much (p. 465, 466,) on the nature of Equity in the interpretation of statutes, saying, Ratio legis est anima legis. And it is a common maxim in the Law of England, that Apices juris non sunt jura. Branch's Maxims, p. 12; Co. Litt. 304 (*b*).

[3] Dig. Lib. 1, tit. 3, l. 10.

approaching to it, but of opposite tendency, which of them ought to govern it; and if there exists no rule, applicable to all the circumstances, whether the party should be remediless, or whether the rule furnishing the closest analogy ought to be followed. The general words of a law may embrace all cases; and yet it may be clear, that all could not have been intentionally embraced; for if they were, the obvious objects of the legislation might or would be defeated. So, words of a doubtful import may be used in a law, or words susceptible of a more enlarged, or of a more restricted meaning, or of two meanings equally appropriate.[1] The question, in all such cases, must be, in what sense the words are designed to be used; and it is the part of a judge to look to the objects of the Legislature, and to give such a construction to the words, as will best further those objects. This is an exercise of the power of equitable interpretation. It is the administration of Equity, as contradistinguished from a strict adherence to the mere letter of the law. Hence arises a variety of rules of interpretation of laws, according to their nature

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[1] It is very easy to see from what sources Mr. Charles Butler drew his own statement (manifestly, as a description of English Equity Jurisprudence, incorrect, as Professor Park has shown,) "that Equity, as distinguished from law, arises from the inability of human foresight to establish any rule, which, however salutary in general, is not, in some particular cases, evidently unjust and oppressive, and operates beyond, or in opposition to its intent, &c. The grand reason for the interference of a Court of Equity is, that the imperfection of the legal remedy, in consequence of the universality of legislative provisions, may be redressed." 1 Butler's Reminisc. 37, 38, 39; Park's Introd. Lect. 5, 6. Now, Aristotle, or Cicero, or a Roman Prætor, or a Continental Jurist, or a Publicist of modern Europe, might have used these expressions, as a description of general Equity; but it would have given no just idea of Equity, as administered under the municipal jurisprudence of England.

and operation, whether they are remedial, or are penal laws; whether they are restrictive of general right, or in advancement of public justice or policy; whether they are of universal application, or of a private and circumscribed intent. But this is not the place to consider the nature or application of those rules.[1]

§ 8. It is of this Equity, as correcting, mitigating, or interpreting the law, that, not only civilians, but common-law writers, are most accustomed to speak;[2] and thus many persons are misled into the false notion, that

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[1] See Grotius de Jure Belli ac Pacis. Lib. 3, ch. 20, § 47, p. 1, 2; Grotius de Æquitate, ch. 1.—This paragraph is copied very closely from the article *Equity*, in Dr. Lieber's Encyclopædia Americana, a license which has not appropriated another person's labors. There will be found many excellent rules of interpretation of Laws in Rutherforth's Institutes of Natural Law, B. 2, ch. 7; in Bacon's Abridgment, title *Statute;* in Domat on the Civil Law, (Prelim. Book, tit. 1, § 2); and in 1 Black. Comm. Introduction, p. 58 to 62.

There are yet other senses, in which Equity is used, which might be brought before the reader. The various senses are elaborately collected by Oldendorpius, in his work de Jure et Æquitate Disputatio; and he finally offers, what he deems a very exact definition of Equity, in its general sense. Æquitas est judicium animi, ex vera ratione petitum, de circumstantiis rerum, ad honestatum vitæ pertinentium, cum incidunt, recte discernens, quid fieri aut non fieri oporteat. This seems but another name for a system of ethics. Grotius has in one short paragraph, (De Æquitate, ch. 1, § 2) brought together the different senses in a clear and exact manner. Et ut de Æquitate primum loquamur, scire oportet, æquitatem aut æquum de omni interdum jure dici, ut cum jurisprudentia ars boni et æqui dicitur; interdum de jure naturali absolute, ut cum Cicero ait, jus legibus, moribus, et Æquitate constare; alias vero de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit. Sæpe etiam de jure aliquo civili proprius ad jus naturale accedente, idque respectu alterius juris, quod paulo longius recedere videtur, ut jus Prætorium et quædam jurisprudentiæ interpretationes. Proprie vero et singulariter Æquitas est virtus voluntatis, correctrix ejus, in quo lex propter universalitatem deficit.

[2] See Merlin Répertoire, Equité. Grounds and Rudim. of the Law (attributed sometimes to Francis,) p. 3, 5, edit. 1751; 1 Fonbl. Equity, B. 1, ch. 1, § 2, note (*e*); 1 Wooddes. Lect. vii. p. 192 to 200; Pothier, Pand. Lib. 1, tit. 3, art. 4, § 11 to 27.

this is the real and peculiar duty of Courts of Equity, in England and America.* St. German, after alluding to the general subject of Equity, says, "In some cases it is necessary to leave the words of the law, and to follow that reason and justice requireth, and to that intent Equity is ordained, that is to say, to temper and mitigate the rigor of the law, &c. And so it appeareth, that Equity taketh not away the very right, but only that that seemeth not to be right, by the general words of the law."[1] And, then, he goes on to suggest the other kind of Equity, as administered in Chancery, to ascertain, "Whether the plantiff hath title in conscience to recover or not."[2] And, in another place, he states: "Equity is a rightwiseness, that considereth all the particular circumstances of the deed, which is also tempered with the sweetness of mercy."[3] Another learned author lays down doctrines equally broad. "As *summum jus* (says he) *summa est injuria*, as it cannot consider circumstances; and as this (Equity) takes in all the circumstances of the case, and judges of the whole matter, according to good conscience, this shows both the use and excellency of Equity above any prescribed law." Again: "Equity is that, which is commonly called equal, just, and good; and is a mitigation or moderation of the common law, in some circumstances, either of the matter, person, or time; and often it dispenseth with the law itself."[4] "The matters, of which Equity holdeth cognizance in its absolute power, are such as are not remediable at law; and of them the sorts may be said to be as infinite, almost, as the different affairs conversant in human life."[5] And, he adds, that "Equity

[1] Dialogue, 1 ch. 16. [2] Id. ch. 17. [3] Id. ch. 16.
[4] Grounds and Rudim. p. 5, 6; edit. 1751. [5] Id. p. 6.

is so extensive and various, that every particular case in Equity may be truly said to stand upon its own particular circumstances; and, therefore, under favor, I apprehend precedents not of that great use in Equity, as some would contend; but that Equity thereby may possibly be made too much a science for good conscience." [1]

§ 9. This description of Equity differs in nothing essential from that given by Grotius and Pufendorf,[2] as a definition of general Equity, as contradistinguished from the Equity, which is recognized by the mere municipal code of a particular nation. And, indeed, it goes the full extent of embracing all things, which the law has not exactly defined, but leaves to the arbitrary description of a judge; or, in the language of Grotius, *de hisce rebus, quas lex non exacte definit, sed arbitrio viri boni permittit.*[3] So that, in this view of the matter, an English Court of Equity would seem to be possessed of exactly the same prerogatives and powers, as belonged to the Prætor's forum in the Roman Law.[4]

§ 10. Nor is this description of the Equity Jurisprudence of England confined to a few text-writers. It

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[1] Grounds and Rudim. p. 5, 6, edit. 1751. Yet Francis (or whoever else was the author) is compelled to admit, that there are many cases in which there is no relief to be had, either at law, or in Equity itself; but the same is left to the conscience of the party, as a greater inconvenience would thence follow to the people in general. Francis, Max. p. 5.

[2] Grotius de Æquitate, ch. 1, § 3, 12; Pufend. Elem. Juris. Univ. L. 1, § 22, 23, cited one Fonbl. Eq. B. 1, ch. 1 § 2, note (*e*), p. 5.

[3] Grotius de Æquitate, ch 1, § 2; 1 Fonbl. Equity, B. 1, ch. 1, § 2, note (*e*).

[4] Dig. Lib. 1, tit. 1, l. 7. See also Heinecc. De Edict. Prætorum, Lib. 1, ch. 6, § 8 to 13; Id. § 18 to 30; Dr. Taylor's Elem. Civ. Law, 213 to 216; Id 92, 93; De Lolme on Eng. Const. B. 1, ch. 11. — Lord Kames does not hesitate to say, that the powers assumed by our Courts of Equity are in affect the same, that were assumed by the Roman Prætor from necessity, without any express authority. 1 Kames, Eq. Introd. 19.

pervades a large class, and possesses the sanction of many high authorities. Lord Bacon more than once hints at it. In his Aphorisms he lays it down, *Habeant similiter Curiæ Prætoriæ potestatem tam subveniendi contra rigorem legis, quam supplendi defectum legis.*[1] And on the solemn occasion of accepting the office of Chancellor, he said: Chancery is ordained to supply the law, and not to subvert the law.[2] Finch, in his Treatise on the Law, says, that the nature of Equity is to amplify, enlarge, and add to the letter of the law.[3] In the Treatise of Equity, attributed to Mr. Ballow, and deservedly held in high estimation, language exceedingly broad is held on this subject. After remarking, that there will be a necessity of having recourse to the natural principles, that what is wanting to the finite may be supplied out of that which is infinite; and that this is properly what is called Equity, in opposition to strict law; he proceeds to state: "And thus in Chancery, every particular case stands upon its own circumstances; and although the common law will not decree against the general rule of law, yet Chancery doth, so as the example introduce not a general mischief. Every matter, therefore, that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief here. For no man can be obliged to any thing contrary to the law of nature; and indeed no man in his senses can be presumed willing to oblige another to it."[4]

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[1] Bac. De Aug. Scient. Lib. 8, ch. 3, Aphor. 65, 45.

[2] Bac. Speech, 4, Bac. Works, 488.

[3] Finch's Law, p. 20.

[4] 1 Fonbl. Eq. B. 1, ch. 1 § 3.—The author of Eunomus describes the original jurisdiction of the Court of Chancery, as a Court of Equity,

§ 11. The Author has, indeed, qualified these propositions with the suggestion: "But if the law has determined a matter with all its circumstances, Equity cannot intermeddle." But, even with this qualification, the propositions are not maintainable, in the Equity Jurisprudence of England, in the general sense, in which they are stated. For example, the first proposition, that Equity will relieve against a general rule of law, is (as has been justly observed) neither sanctioned by principle nor by authority.[1] For, though it may be true, that Equity has, in many cases, decided differently from Courts of Law; yet it will be found, that these cases involved circumstances, to which a Court of Law would not advert; but which, in point of substantial justice, were deserving of particular consideration; and which a Court of Equity, proceeding on principles of substantial justice, felt itself bound to respect.[2]

§ 12. Mr. Justice Blackstone has taken considerable pains to refute this doctrine. "It is said," (he remarks,) "that it is the business of a Court of Equity, in England, to abate the rigor of the common law.[3] But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; yet a Court of Equity had no power to interfere. Hard is the common law still subsisting, that land devised, or descending to the heir,

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to be "the power of moderating the *summum jus*." Eunomus, Dial. 3, § 60.

[1] Com. Dig. Chancery, 3, F. 8.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*); 1 Dane's Abrig. ch. 9, art. 1, § 2, 3; Kemp *v.* Prayer, 7, Ves. 249, 250.

[3] Grounds and Rudim. p. 74, (Max. 105.) edit. 1751.

should not be liable to simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land; and that the father shall never immediately succeed as heir to the real estate of the son. But a Court of Equity can give no relief; though, in both these instances, the artificial reason of the law, arising from feudal principles, has long since ceased." [1] And illustrations of the same character may be found in every State of the Union. In some States, bond debts have a privilege of priority of payment over simple contract debts, in cases of insolvent intestate estates. In others, judgments are a privileged lien on lands, In many, if not in all, a debtor may prefer one creditor to another, in discharging his debts, when his assets are wholly insufficient to pay all the debts. And, (not to multiply instances,) what can be more harsh, or indefensible, than the rule of the common law, by which a husband may receive an ample fortune in personal estate, through his wife, and by his own act, or will, strip her of every farthing, and leave her a beggar?

§ 13. A very learned Judge in Equity, in one of his ablest judgments, has put this matter in a very strong light.[2] "The Law is clear," (said he,) "and Courts of Equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue. And, though, proceedings in Equity are said to be *secundum discretionem boni viri;* yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat.* And, as it is said in Rook's case,

[1] 3 Black. Comm. 430. See Com. Dig. Chancery, 3, F. 8.
[2] Sir Joseph Jekyll, in Cowper v. Cowper, 2, P. Will. 753.

(5 Rep. 99. b.) that discretion is a science, not to act arbitrarily, according to men's wills, and private affections; so, that discretion, which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases, follows the law implicitly; in others, assists it, and advances the remedy; in others, again, it relieves against the abuse, or allays the rigor of it. But in no case, does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to the Court. That is a discretionary power which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution intrusted with." [1]

§ 14. The next proposition, that every matter that happens inconsistent with the design of the legislator, or is contrary to natural justice, may find relief in Equity, is equally untenable. There are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal. And so far from a Court of Equity supplying universally the defects of positive legislation, or peculiarly carrying into effect the intent, as contradistinguished from the text of the Legislature, it is governed by the same rules of interpretation as a Court of Law; and is often compelled to stop where the letter of the law stops. It is the duty of every court of

[1] Sir Thomas Clarke, in pronouncing his judgment in the case of Burgess *v.* Wheate, (1 W. Black. R. 123,) has adopted this very language, and given it his full approbation. See also, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*). See also, Fry *v.* Porter, 1 Mod. R. 300. — Grounds and Rudim. p. 65, (Max. 92.) edit. 1751.

justice, whether of Law or of Equity, to consult the intention of the Legislature. And, in the discharge of this duty, a Court of Equity is not invested with a larger or a more liberal discretion than a Court of Law.[1]

§ 15. Mr. Justice Blackstone has here again met the objection in a forcible manner. "It is said," (says he,) "that a Court of Equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a Court of Law. Both, for instance, are equally bound, and equally profess to interpret statutes according to the true intent of the Legislature. In general, all cases cannot be foreseen; or, if foreseen, cannot be expressed. Some will arise which will fall within the meaning, though not within the words of the legislator; and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the Equity of an Act of Parliament; and so, cases within the letter, are frequently out of the Equity. Here, by Equity, we mean nothing but the sound interpretation of the law, &c., &c. But there is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the Judges in the Courts both of Law and Equity. The construction must in both be the same; or, if they differ, it is only as one Court of Law may happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question. Neither can enlarge, diminish, or alter that sense in a single tittle."[2]

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*).
[2] 3 Black. Comm. 431; 1 Dane, Abr. ch. 9, art. 3, § 3.

§ 16. Yet it is by no means uncommon to represent, that the peculiar duty of a Court of Equity is to supply the defects of the Common Law, and next, to correct its rigor or injustice.[1] Lord Kaims avows this doctrine in various places, and in language singularly bold. "It appears now clearly," (says he,) "that a Court of Equity commences at the limits of the Common Law, and enforces benevolence, where the law of nature makes it our duty. And thus a Court of Equity, accompanying the law of nature in its general refinements enforces every natural duty, that is not provided for at Common Law."[2] And in another place he adds, a Court of Equity boldly undertakes "to correct or mitigate the rigor, and what, in a proper sense, may be termed the injustice of the Common Law."[3] And Mr. Wooddeson, without attempting to distinguish accurately between general or natural, and municipal or civil Equity, asserts, that "Equity is a judicial interpretation of laws, which, presupposing the legislator to have intended what is just and right, pursues and effectuates that intention."[4]

§ 17. The language of Judges has often been relied on for the same purpose; and, from the unqualified manner in which it is laid down, too often justifies the conclusion. Thus, Sir John Trevor, (the Master of the

[1] 1 Kaims on Equity, B. 1, p. 40.

[2] 1 Kaims on Equity, Introd. p. 12.

[3] Id. Introd. p. 15. — Lord Kaims's remarks are entitled to the more consideration, because they seem to have received in some measure at least, the approbation of Lord Hardwicke (Farke's Hist. of Chan. Appx. 501, 502; Id. 333, 334); and also from Mr. Justice Blackstone's having thought them worthy of a formal refutation in his Commentaries. (3 Black. Comm. 436.)

[4] 1 Wooddeson, Lect. vii. p. 192.

Rolls,) in his able judgment in Dudley *v.* Dudley,[1] says: "Now, Equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigor, hardness, and edge of the law, and is a universal truth. It does also assist the law where it is defective and weak in the constitution, (which is the life of the law) and defends the law from crafty evasions, delusions, and mere subtilities, invented and contrived to evade and elude the Common Law, whereby such as have undoubted right are made remediless. And thus is the office of Equity to protect and support the Common Law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it." Now, however true this doctrine may be *sub modo*, to suppose it true in its full extent would be a grievous error.

§ 18. There is another suggestion, which has been often repeated; and that is, that Courts of Equity are not, and ought not, to be bound by precedents; and that precedents therefore are of little or no use there; but that every case is to be decided upon circumstances, according to the arbitration or discretion of the Judge, acting according to his own notions *ex æquo et bono*.[2] Mr. Justice Blackstone, addressing himself to this erroneous statement, has truly said: "The system of our Courts of Equity is a labored connected system, governed by established rules, and bound down by precedents, from which they do not depart, although the reason of some of them may perhaps be liable to objection, &c., &c. Nay, sometimes a precedent is so

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[1] Preced. in Ch. 241, 244; 1 Wooddes. Lect. vii. p. 192.

[2] See Francis, Max. p. 5, 6; Selden, cited in 3 Black, Comm. 432, 433, 435; 1 Kaims, Eq. p. 19, 20.

strictly followed, that a particular judgment, founded upon special circumstances, gives rise to a general rule."[1] And he afterwards adds: "The system of jurisprudence in our Courts of Law and Equity are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings."[2] The value of precedents and the importance of adhering to them were deeply felt in ancient times, and nowhere more than in the Prætor's forum. *Consuetudinis autem jus esse putatur id,* (says Cicero,) *quod, voluntate omnium, sine lege, vetustas comprobârit. In eâ autem jura sunt, quædam*

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[1] 3 Black. Comm. 432, 433.

[2] 3 Black. 434; Id. 440, 441; 1 Kent, Comm. Lect. 21, p. 489, 490, (2d edition.) The value and importance of precedents in Chancery were much insisted upon by Lord Keeper Bridgman, in Fry *v.* Porter, (1 Mod. R. 300, 307.) See also 1 Wooddes. Lect. vii. p. 200, 201, 202. Lord Hardwicke, in his letter to Lord Kaims, on the subject of Equity, in answer to the question whether a Court of Equity ought to be governed by any general rules, said: "Some general rules there ought to be; for otherwise the great inconvenience of *jus vagum et incertum* will follow. And yet the Prætor must not be so absolutely and invariably bound by them, as the Judges are by the rules of the Common Law. For if they were so bound, the consequence would follow, which you very judiciously state, that he must sometimes pronounce decrees, which would be materially unjust; since no rule can be equally just in the application to a whole class of cases, that are far from being the same in every circumstance." (Parke's Hist. of Chancery, p. 501, 506.) This is very loosely said; and the reason given, equally applies to every general rule; for there can be none, which will be found equally just in its application to all cases. If every change of circumstances is to change the rule in Equity, there can be no general rule. Every case must stand upon its own ground. Yet Courts of Equity now adhere as closely to general rules as Courts of Law. Each expounds its rules to meet new cases; but each is equally reluctant to depart from them upon slight inconveniences and mischiefs. See Mitford, Plead. in Eq. p. 4, note (*b*); 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*k*). The late Professor Park, of King's College (London,) has made some very acute remarks on this whole subject, in his Introductory Lecture on Equity, (1832.)

ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, quæ Prætores edicere consuêrunt.[1] And the Pandects directly recognize the same doctrine. *Est enim juris civilis species* CONSUETUDO; *enimvero, Diuturna consuetudo pro jure et lege, in his, quæ non ex scripto descendunt observari, solet, &c. Maxime autem probatur consuetudo ex rebus judicatis.*[2]

§ 19. If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis*, and, it may be, *ex æquo et bono*, according to his own notions and conscience; but still acting with a despotic and sovereign authority. A Court of Chancery might then well deserve the spirited rebuke of Selden: "For law we have a measure, and know what to trust to. Equity is according to the conscience of him, that is Chancellor; and as that is larger, or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure the Chancellor's foot. What an uncertain mea-

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[1] Cicero de Invent. Lib. 2, cap. 22.—My attention was first called to these passages by a note of Lord Redesdale. Mitford, Plead. Eq. p. 4, note (*b*). See Heineccius De Edictis Prætorum, Lib. 1, cap. 6, § 13, 30.

[2] Pothier, Pand. Lib. 1, tit. 3, art. 6, n. 28, 29; Dig. Lib. 1, tit. 3, l. 33, l. 34.

sure would this be? One Chancellor has a long foot; another a short foot; a third an indifferent foot. It is the same thing with the Chancellor's conscience."[1] And notions of this sort were, in former ages, when the Chancery Jurisdiction was opposed with vehement disapprobation by common lawyers, very industriously propagated by the most learned of English antiquarians, such as Spelman, Coke, Lambard, and Selden.[2] We might, indeed, under such circumstances, adopt the language of Mr. Justice Blackstone, and say: "In short, if a Court of Equity in England did really act, as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case."[3] So far, however, is this from being true, that one of the most common maxims, upon which a Court of Equity daily acts, is, that Equity follows the law, and seeks out and guides itself by the analogies of the law.[4]

§ 20. What has been already said upon this subject, cannot be more fitly concluded, than in the words of one of the ablest Judges, that ever sat in Equity. "There are," (said Lord Redesdale,) "certain principles, on which Courts of Equity act, which are very well settled. The cases, which occur, are various; but they are decided on fixed principles. Courts of Equity have, in this respect, no more discretionary power, than Courts of Law.

[1] Selden's Table Talk, title, *Equity*; 3 Black. Comm. 432, note (*y*).

[2] See citations, 3 Black. Comm. 433, Id. 54, 55; Id. 440, 441.

[3] 3 Black. Comm. 433; Id. 440, 441, 442.—De Lolme, in his work on the Constitution of England, has presented a view of English Equity Jurisprudence, far more exact and comprehensive, than many of the English text writers on the same subject. The whole chapter (B. 1, ch. 11.) is well worthy of perusal.

[4] Cowper v. Cowper, 2 P. Will. 753.

They decide new cases, as they arise, by the principles, on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain, as the principles on which the Courts of Common Law proceed."[1] In confirmation of these remarks, it may be added, that the Courts of Common Law are, in like manner, perpetually adding to the doctrines of the old jurisprudence; and enlarging, illustrating, and applying the maxims, which were at first derived from very narrow and often obscure sources. For instance, the whole law of Insurance is scarcely a century old; and more than half of its most important principles and distinctions have been created within the last fifty years.

§ 21. In the early history of English Equity Jurisprudence, there might have been, and probably was, much to justify the suggestion, that Courts of Equity were bounded by no certain limits or rules; but they acted upon principles of conscience and natural justice, without much restraint of any sort.[2] And, as the Chancellors were, for many ages, almost universally either ecclesiastics or statesmen, neither of whom are supposed to be very scrupulous in the exercise of power; and as they exercised a delegated authority from the Crown, as the fountain of administrative justice, whose rights, prerogatives, and duties on this subject were not well defined, and whose decrees were not capable of being resisted, it would not be unnatural, that they should arrogate to themselves the general attributes of royalty, and interpose in many cases, which seemed to them to

[1] Bond *v.* Hopkins, 1 Sch. & Lefr. R. 428, 429. See also Mitford on Plead. Eq. p. 4, note (*b*).

[2] 1 Kent, Comm. Lect. 21, p. 490, 491, 492, (2d edit.)

require a remedy, more wide or more summary than was adopted by the common Courts of Law.

§ 22. This is the view, which Mr. Justice Blackstone seems to have taken of the matter; who has observed, that, in the infancy of our Courts of Equity, before their jurisdiction was settled, the Chancellors themselves, "partly from their ignorance of the law (being frequently bishops or statesmen); partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in,) but principally from the narrow and unjust decisions of the Courts of Law, had arrogated to themselves such unlimited authority, as hath totally been disclaimed by their successors, for now (1765) above a century past. The decrees of the Court of Equity were then rather in the nature of awards, formed on the sudden, *pro re natâ*, with more probity of intention, than knowledge of the subject, founded on no settled principles, as being never designed, and therefore never used, as precedents."[1]

§ 23. It was fortunate, indeed, that, even in those early times, the knowledge which the ecclesiastical Chancellors had acquired of general equity and justice from the civil law, enabled them to administer them with a more sound discretion, than could otherwise have been done. And from the moment, when principles of decision came to be acted upon and established in Chancery, the Roman law furnished abundant principles to erect a superstructure, at once solid, convenient, and lofty, adapted to human wants, and enriched by all the aids of human wisdom, experience, and learning. To say that later Chancellors have borrowed much from these

[1] 3 Black. Comm. 433; Id. 440, 441.

materials, is to bestow the highest praise upon their judgment, their industry, and their reverential regard to their duty. It would have been little to the commendation of such learned minds, that they had studiously disregarded the maxims of ancient wisdom, or had neglected to use them, from ignorance, from pride, or from indifference.[1]

§ 24. Having dwelt thus far upon the inaccurate, or inadequate notions, which are frequently circulated, as to Equity Jurisprudence, in England and America, it may be thought proper to give some more exact and clear statement of it. This may be better done by explanatory observations, than by direct definitions, which are often said in the law to be perilous and unsatisfactory.

§ 25. In England, and in the American States, which have derived their jurisprudence from that parental source, Equity has a restrained and qualified meaning. The remedies for the redress of wrongs, and for the enforcement of rights, are distinguished into two classes; first, those which are administered in Courts of Common Law; and secondly, those which are administered in Courts of Equity. Rights, which are recognized

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[1] The whole of the late Professor Park's Lecture upon Equity Jurisprudence, delivered in King's College in Nov. 1831, on this subject, is well deserving of a perusal by every student. There is much freedom and force in his observations; and if his life had been longer spared, he would probably have been a leader in a more masculine and extensive course of law studies by the English Bar. There are also two excellent articles on the same subject in the American Jurist, one of which, published in 1829, contains a most elaborate review and vindication of the Jurisdiction of Courts of Equity; and the other in 1833, a forcible exposition of the prevalent errors on the subject, (2 Amer. Jurist, 314; 10 Amer. Jurist, 227.) I know not where to refer the reader to pages more full of useful comment and research.

and protected, and wrongs, which are redressed, by the former Courts, are called legal rights and legal injuries. Rights, which are recognized and protected, and wrongs, which are redressed by the latter Courts only, are called equitable rights and equitable injuries. The former are said to be rights and wrongs at Common Law, and the remedies, therefore, are remedies at Common Law; the latter are said to be rights and wrongs in Equity, and the remedies, therefore, are remedies in Equity. Equity Jurisprudence may, therefore, properly be said to be that portion of remedial justice, which is exclusively administered by a Court of Equity, as contradistinguished from that portion of remedial justice, which is exclusively administered by a Court of Common Law.

§ 26. The distinction between the former and the latter Courts may be farther illustrated by considering the different natures of the rights they are designed to recognize and protect, the different natures of the remedies which they apply, and the different natures of the forms and modes of proceeding which they adopt, to accomplish their respective ends. In the Courts of Common Law, both of England and America, there are certain prescribed forms of action, to which the party must resort to furnish him a remedy; and, if there be no prescribed form to reach such a case, he is remediless; for they entertain jurisdiction only of certain actions, and give relief according to the particular exigency of such actions, and not otherwise. In those actions a general and unqualified judgment only can be given, for the plaintiff, or for the defendant, without any adaptation of it to particular circumstances.

§ 27. But there are many cases, in which a simple judgment for either party, without qualifications, or

conditions, or peculiar arrangements, will not do entire justice *ex æquo et bono* to either party. Some modifications of the rights of both parties may be required; some restraints on one side, or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations, or duties; some compensatory or preliminary, or concurrent proceedings to fix, control, or equalize rights; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights, or the redress of injuries. In all these cases, Courts of Common Law cannot give the desired relief. They have no forms of remedy adapted to the objects. They can entertain suits only in a prescribed form, and they can give a general judgment only in the prescribed form.[1] From their very character and organization they are incapable of the remedy, which the mutual rights and relative situations of the parties, under the circumstances, positively require.

§ 28. But Courts of Equity are not so restrained. Although they have prescribed forms of proceeding, the latter are flexible, and may be suited to the different postures of cases. They may adjust their decrees, so as to meet most, if not all, of these exigencies; and they may vary, qualify, restrain, and model the remedy, so as to suit it to mutual and adverse claims, controlling equities, and the real and substantial rights of all the parties. Nay, more; they can bring before them all parties interested in the subject-matter, and adjust the rights of all, however numerous; whereas, Courts of Common Law are compelled to limit their

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[1] Mitford on Plead. p. 3, 4; 1 Wooddes. Lect. vii. p. 203 to 206.

inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit. So that one of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to all the varieties of circumstances, which may arise, and adjust them to all the peculiar rights of all the parties in interest; whereas Courts of Common Law, (as we have already seen) are bound down to a fixed and invariable form of judgment in general terms, altogether absolute, for the plaintiff, or for the defendant.[1]

§ 29. Another peculiarity of Courts of Equity is, that they can administer remedies for rights, which rights Courts of Common Law do not recognize at all; or, if they do recognize them, they leave them wholly to the conscience and good-will of the parties. Thus, what are technically called Trusts, that is, estates vested in persons upon particular trusts and confidences, are wholly without any cognizance at the Common Law; and the abuses of such trusts and confidences are beyond the reach of any legal process. But they are cognizable in Courts of Equity; and hence they are called Equitable estates; and an ample remedy is there given in favor of the *cestuis que trust*, (the parties beneficially interested,) for all wrongs and injuries, whether arising from negligence, or positive miscon-

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1 Wooddes. Lect. vii. p. 203 to 206; 3 Black. Comm. 438. — Much of this paragraph has been abstracted from Dr. Lieber's Encyclopædia Americana, article *Equity*. The late Professor Park, of King's College, London, in his Introductory Lecture on Equity, (1831, p. 15,) has said, 'The editors of the Encyclopædia Americana have stated the real case, with regard to what we call Courts of Equity, much more accurately than I can find it stated in any English Law Books;" and he thus admits the propriety of the exposition contained in the text.

duct.[1] There are also many cases (as we shall presently see) of losses and injuries by mistake, accident, and fraud; many cases of penalties and forfeitures; many cases of impending irreparable injuries, or meditated mischiefs; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress; but which the Common Law takes no notice of, or silently disregards.[2]

§ 30. Again; the remedies in Courts of Equity are often very different, in their nature, mode, and degree, from those of Courts of Common Law, even when each has a jurisdiction over the same subject-matter. Thus, a Court of Equity, if a contract is broken, will often compel the party specifically to perform the contract; whereas Courts of law can only give damages for the breach of it. So, Courts of Equity will interfere by way of injunction to prevent wrongs; whereas, Courts of Common law can grant redress only, when the wrong is done.[3]

§ 31. The modes of seeking and granting relief in Equity are also different from those of Courts of Common Law. The latter proceed to the trial of contested facts by means of a jury; and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. But Courts of Equity try causes without a jury; and they address

[1] 3 Black. Comm. 439; 1 Wooddes. Lect. vii. p. 209 to 213; 2 Fonbl Equity, B. 2, ch. 1, § 1; Id. ch. 7; Id. ch. 8.

[2] 1 Wooddes. Lect. vii. p. 203, 204; 3 Black. Comm. 434, 435, 438, 439; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

[3] 1 Wooddes. Lect. vii. p. 206, 207.

themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill, if they are within his knowledge; and he is compellable to give a full account of all such facts, with all their circumstances, without evasion, or equivocation; and the testimony of other witnesses also may be taken to confirm, or to refute, the facts so alleged.[1] Indeed, every bill in Equity may be said to be, in some sense, a bill of discovery, since it asks for the personal oath of the defendant, to purge himself in regard to the transactions stated in the bill. It may readily be perceived, how very important this process of discovery may be, when we consider, how great the mass of human transactions is, in which there are no other witnesses, or persons, having knowledge thereof, except the parties themselves.

§ 32. Mr. Justice Blackstone has, in a few words, given an outline of some of the more important powers and peculiar duties of Courts of Equity. He says, that they are established "to detect latent frauds, and concealments, which the process of Courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstance of the case, than can always be obtained by the generality of the rules of the positive or Common Law."[2] But the general account of Lord Redesdale (which he admits, however, to be

[1] 3 Black. Comm. 437, 438; 1 Wooddes. Lect. vii. p. 207.
[2] 1 Black. Comm. 92.

imperfect, and in some respects inaccurate) is far more satisfactory, as a definite enumeration. "The jurisdiction of a Court of Equity," (says he,)[1] "when it assumes a power of decision, is to be exercised, (1.) where the principles of law, by which the ordinary courts are guided, give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose; (2.) where the courts of ordinary jurisdiction are made instruments of injustice; (3.) where the principles of law, by which the ordinary courts are guided, give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent. And it may also be collected, that Courts of Equity, without deciding upon the rights of the parties, administer to the ends of justice by assuming a jurisdiction; (4.) to remove impediments to the fair decision of a question in other courts; (5.) to provide for the safety of property in dispute, pending a litigation, and to preserve property in danger of being dissipated or destroyed by those, to whose care it is by law entrusted, or by persons having immediate but partial interests; (6.) to restrain the assertion of doubtful rights in a manner productive of irreparable damage; (7.) to prevent injury to a third person by the doubtful title of others; and (8.) to put a bound to vexatious and oppressive litigation, and to prevent multiplicity of suits. And further, that Courts of Equity, without pronouncing any judgment, which may affect the rights of parties, extend their jurisdiction, (9.) to compel a discovery, or obtain

[1] Mitford, Pl. Eq. by Jeremy, p. 111, 112.

evidence, which may assist the decision of other courts; and (10.) to preserve testimony, when in danger of being lost, before the matter, to which it relates, can be made the subject of judicial investigation." [1]

§ 33. Perhaps the most general, if not the most precise, description of a Court of Equity, in the English and American sense, is, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.[2] The remedy must be plain; for, if it be doubtful and obscure at law, Equity will assert a jurisdiction.[3] It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in Equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise, Equity will interfere and give such relief and aid, as the exigency of the particular case may require.[4] The jurisdiction of a

[1] Dr. Dana, in his Abridgment and Digest, ch. 1, art. 7, § 33 to 51, (1 Dana, Abrid. 101 to 107,) has given a summary of the differences between Equity Jurisdiction and Legal Jurisdiction, in regard to contracts, which may be read with utility. — See also Mitford, Equity Pl. by Jeremy, 4, 5.

[2] Cooper, Eq. Pl. 128, 129; Mitford, Pl. Eq. by Jeremy, 112, 123; 1 Wooddes. Lect. vii. p. 214, 215.

[3] Rathbone *v.* Warren, 10 John. R. 587; King *v.* Baldwin, 17 John. R. 284.

[4] See Dr. Lieber's Ency. Americana, art. *Equity;* Mitford, Eq. Plead. by Jeremy, 111, 112, 117, 123; 1 Wooddes. Lect. vii. p. 214, 215; Hinde's Pract. 153; Cooper, Eq. Pl. — Sir James Mackintosh, in his Life of Sir Thomas More, says: "Equity, in the acceptation in which the word is used in English jurisprudence, is no longer to be confounded with that

Court of Equity is, therefore, sometimes concurrent with the jurisdiction of a Court of Law; it is sometimes exclusive of it; and it is sometimes auxiliary to it.[1]

§ 34. Many persons, and especially foreigners, have often expressed surprise, that distinct Courts should, in England and America, be established for the administration of Equity, instead of the whole administration of municipal justice being confided to one and the same class of Courts, without any discrimination between Law and Equity.[2] But this surprise is founded almost wholly upon an erroneous view of the nature of Equity Jurisprudence. It arises from confounding the general

moral Equity, which generally corrects the unjust operation of law, and with which it seems to have been synonymous in the days of Selden and Bacon. It is a part of laws formed from usages and determinations, which sometimes differ from what is called Common Law in its subjects; but chiefly varies from it in its modes of proof, of trial, and of relief. It is a jurisdiction so irregularly formed, and often so little dependent upon general principles, that it can hardly be defined or made intelligible, otherwise than by a minute enumeration of the matters cognizable by it." There is much of general truth in this statement; but it is, perhaps, a little too broad and undistinguishing for an accurate equity lawyer. Equity, as a science, and part of jurisprudence, built upon precedents, as well as upon principles, must occasionally fail in the mere theoretical and philosophical accuracy and completeness of all its rules and governing principles. But it is quite as regular, and exact in its principles and rules, as the Common Law; and, probably, as any other system of jurisprudence, established, generally, by positive enactments, or usages, or practical expositions, in any country, ancient or modern. There must be many principles and exceptions in every system, in a theoretical sense, arbitrary, if not irrational; but which are yet sustained by the accidental institutions, or modifications of society, in the particular country where they exist. There are wide differences between the philosophy of law, as actually administered in any country, and that abstract doctrine, which may in matters of government, constitute, in many minds, the law of philosophy.

[1] Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

[2] 3 Black. Comm. 441, 442.

sense of Equity, which is equivalent to universal or natural justice, *ex æquo et bono*, with its technical sense, which is descriptive of the exercise of jurisdiction over peculiar rights and remedies. Such persons seem to labor under the false notion, that Courts of Law can never administer justice with reference to principles of universal or natural justice, but are confined to rigid, severe, and uncompromising rules, which admit of no equitable considerations. Now, such a notion is founded in the grossest mistake of our systems of jurisprudence. Courts of Common Law, in a great variety of cases, adopt the most enlarged and liberal principles of decision; and, indeed, often proceed, as far as the nature of the rights and remedies, which they are called to administer, will permit, upon the same doctrines as Courts of Equity. This is especially true, in regard to cases involving the application of the law of nations, and of commercial and maritime law and usages, and even of foreign municipal law. And Mr. Justice Blackstone has correctly said, that "where the subject-matter is such, as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of the Courts of Law are guided by the most liberal equity."[1]

§ 35. Whether it would, or would not, be best to administer the whole of remedial justice in one Court, or in one class of Courts, without any separation or distinctions of suits, or of the form or modes of proceeding and granting relief, is a matter, upon which different minds in the same country, and certainly in different countries, would probably arrive at opposite conclusions.

[1] 3 Black. Comm. 430. See Eunomus, Dial. 3, § 60.

And, whether, if distinctions in rights and remedies, and forms of proceeding are admitted in the municipal jurisprudence, it would be best to confide the whole jurisdiction to the same Court or Courts, is also a matter, upon which an equal diversity of judgment might be found to exist. Lord Bacon, upon more than one occasion, expressed his decided opinion, that a separation of the administration of Equity from that of the Common Law was wise and convenient. "All nations," (says he,) "have Equity. But some have Law and Equity mixed in the same Court, which is worse; and some have it distinguished in several Courts, which is better."[1] And again, among his aphorisms, he says: *Apud nonnullos receptum est, ut jurisdictio, quæ decernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum, iisdem curiis deputentur; apud alios autem et diversis. Omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum; sed arbitrium legem tandem trahet.*[2] Lord Hardwicke held the same opinion;[3] and it is certainly a common opinion in countries, governed by the Common Law. In Civil Law Countries, the general, if not the universal, practice is the other way;[4] whether more for the advancement of public justice, is a matter of doubt with many learned minds.

§ 36. But, whether the one opinion, or the other, be most correct in theory, it is most probable, that the practical system, adopted by every nation, has been mainly influenced by the peculiarities of its own insti-

[1] Bac. Jurisd. of the Marches; 4 Bac. Works, 274.
[2] Bac. De Aug. Scient. Lib. 8, cap. 3, Aph. 45; 7 Bac. Works, 448.
[3] Parkes, Hist. Chan. App. p. 504, 505.
[4] 1 Kames on Eq., Introd. p. 27 to 30.

tutions, habits, and circumstances; and especially by the nature of its own jurisprudence, and the forms of its own remedial justice. The union of Equity and Law in the same Court, which might be well adapted to one country, or even to one age, might be wholly unfit for another country, or for another age. The question, in all such cases, must be a mixed question of public policy and private convenience; and never can be susceptible of any universal solution, applicable to all times, and all nations, and all changes in jurisprudence.

§ 37. Accordingly we find, that in the nations of antiquity different systems existed. And in Rome, with whose juridical institutions we are best acquainted, not only were different jurisdictions intrusted to different magistrates; but the very distinction between Law and Equity was clearly recognized.[1] Thus, civil jurisdiction and criminal jurisdiction were confided to different magistrates.[2] The Roman Prætors generally exercised the former only. In the exercise of this authority, a broad distinction was taken between Actions at Law and Actions in Equity, the former having the name of *Actiones Civiles*, and the latter of *Actiones Prætoriæ*. And, in the same way, a like distinction was taken between *Obligationes Civiles* and *Obligationes Prætoriæ*, between *Actiones Directæ* and *Actiones Utiles*.[3] And, in

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1 3 Black. Comm. 50; Parkes, Hist. Chan. 28; Butler's Horæ Subsecivæ, [43] p. 66; 1 Collect. Jurid. 25; Pothier, Pand. Lib. 1, tit. 2, § 2 to 24; Id. tit. 10, § 1, 2, 3; Id. tit. 11, § 1 to 9; Id. tit. 14, § 1, 2; Id. tit. 20.

2 Taylor's Elem. Civ. Law, 211, 213, 215, 216; Pothier, Pand. Lib. 2, tit. 1, art. 2, § 5 to 8; Id. § 10.

3 Taylor's Elem. Civil Law, 213, 214; Id. 93, 94, 95; Pothier, Pand. Lib. 50, tit. 16; De Verb. Signif. Actio; Inst. Lib. 4, tit. 6, § 3, 8; Inst.

modern nations, it is not uncommon for different portions of judicial jurisdiction to be vested in different magistrates or tribunals. Thus, questions of State or Public Law, such as prize causes, and causes touching sovereignty, are generally confided to special tribunals; and maritime and commercial questions often belong to Courts of Admiralty, or other Courts, constituted for commercial purposes. There is, then, nothing incongruous, much less absurd, in separating different portions of municipal jurisprudence from each other, in the administration of justice; or in denying to one Court the power to dispose of all the merits of a cause, when its forms of proceeding are ill adapted to afford complete relief, and giving jurisdiction of the same cause to another Court, better adapted to do entire justice by its larger and more expansive authority.

Lib. 3, tit. 14, § 1; Heinecc. De Edict. Prætor. Lib. 1, cap. 6; 3 Black. Comm. 50; Parkes, Hist. Ch. 28. — See 1 Collect. Jurid. 33; De Lolme on Eng. Const. B. 1, ch. 11.

CHAPTER II.

THE ORIGIN AND HISTORY OF EQUITY JURISPRUDENCE.

§ 38. HAVING thus ascertained what is the true nature and character of Equity Jurisprudence, as it is administered in countries governed by the Common Law, it seems proper, before proceeding to the consideration of the particulars of that jurisdiction, to take a brief review of its origin and progress in England, from which country America has derived its own principles and practice on the same subject. It is not intended here to speak of the Common Law Jurisdiction of the Court of Chancery, or of any of its specially delegated jurisdiction in exercising the prerogatives of the Crown, as in cases of infancy and lunacy; or of its statutable jurisdiction in cases of bankruptcy.[1] The inquiry will mainly relate to its equitable, or, as it is sometimes called, its extraordinary jurisdiction.[2]

§ 39. The Origin of the Court of Chancery is involved in the same obscurity, which attends the investigation of many other questions, of high antiquity, relative to the Common Law.[3] The administration of justice in England was originally confided to the *Aula Regis*, or great Court or Council of the King, as the

[1] See Com. Dig. Chancery, C. 1; 1 Madd. Ch. Pr. 262; 2 Madd. Ch. Pr. 447; Id. 565; 3 Black. Comm. 426, 427, 428.

[2] 3 Black. Comm. 50; Com. Dig. Chancery, C. 2; 4 Inst. 79; 2 Inst. 552.

[3] Mitford, Pl. Equity, 1; Com. Dig. Chancery, A. 1; 4 Inst. 79; 1 Wooddes. Lect. vi.

Supreme Court of Judicature, which, in those early times, undoubtedly administered equal justice, according to the rules of both Law and Equity, or of either, as the case might chance to require.[1] When that Court was broken into pieces, and its principal jurisdiction distributed among various Courts, the Common Pleas, the King's Bench, and the Exchequer, each received a certain portion, and the Court of Chancery also obtained a portion.[2] But, at that period, the idea of a Court of Equity, as contradistinguished from a Court of Law, does not seem to have subsisted in the original plan of partition, or to have been in the contemplation of the sages of the day.[3] Certain it is, that among the earliest writers of the Common Law, such as Bracton, Glanville, Britton and Fleta, there is not a syllable to be found relating to the equitable jurisdiction of the Court of Chancery.[4] Fleta, indeed, mentions the existence of a certain office, called the Chancery, and that to the office "it belongs, to hear and examine the petitions and complaints of Plaintiffs, and to give them, according to the nature of the injuries shown by them, due remedy by the *writs of the King*."[5]

§ 40. That the Court of Chancery, in the exercise of its ordinary jurisdiction, is a Court of very high anti-

[1] 3 Black. Comm. 50; 1 Reeves, Hist. 62, 63.

[2] 3 Black. Comm. 50; Com. Dig. Chancery, A. 1, 2, 3; 1 Collect. Jurid. 27 to 30; Parkes, Hist. Chan. 16, 17, 28, 56; 1 Eq. Abridg. 129; Courts, B. note (*a*); 1 Wooddes. Lect. vi. p. 174, 175; Gilb. For. Roman. 14; 1 Reeves, Hist. 59, 60, 63; Bac. Abridg. Court of Chancery, C.

[3] 3 Black. Comm. 50.— The Legal. Judic. in Chanc. stated, (1727,) ch. 2, p. 24.

[4] Id. 50; Parkes, Hist. Chan. 25; 4 Inst. 82; 1 Reeves, Hist. 61; 2 Reeves, Hist. 250, 251.

[5] Parkes, Hist. Chan. 25; Fleta, Lib. 2, cap. 13; 4 Inst. 78.

quity, cannot be doubted. It was said by Lord Hobart, that it is an original and fundamental Court, as ancient as the kingdom itself.[1] The name of the Court, Chancery, (*Cancellaria,*) is derived from that of the presiding officer, Chancellor, (*Cancellarius,*) an officer of great distinction, whose office may be clearly traced back, before the Conquest, to the times of the Saxon kings, many of whom had their Chancellors.[2] Lord Coke supposes that the title *Cancellarius*, arose from his cancelling (*a cancellando*) the king's letters-patent, when granted contrary to law, which is the highest point of jurisdiction.[3] But the office and name of Chancellor (Mr. Justice Blackstone has observed) was certainly known to the courts of the Roman Emperors; where it originally seems to have signified a chief scribe, or secretary, who was afterwards invested with several judicial powers, and a general superintendency over the rest of the officers of the prince.[4] From the Roman Emperors it passed to the Roman Church, ever emulous of imperial state; and hence every Bishop has to this day his Chancellor, the principal judge of his Consistory. And when the modern kingdoms of Europe were established upon the ruins of the Empire, almost every state preserved its Chancellor, with different jurisdictions and dignities, according to their different constitutions. But in all of them, he seems to have

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[1] Hobart, R. 63; Com. Dig. Chancery, A. 1, 2; 2 Inst. 551, 552; 4 Inst. 78, 79.

[2] Com. Dig. Chancery, A. 1; 4 Inst. 78; 1 Wooddes. Lect. vi. p. 161 to 165; Prynne's Animadv. 48; 1 Coll. Jurid. 26; 1 Rep. in Chan. App. 5, 7.

[3] 4 Inst. 88; Eunomus, Dial. 3, § 60.

[4] See Parkes, Hist. Chan. 14; 1 Wooddes. Lect. vi. p. 160; Hist. of Chancery, (1726,) 3, 4.

had the supervision of all charters, letters, and such other public instruments of the Crown, as were authenticated in the most solemn manner; and, therefore, when seals came in use, he always had the custody of the King's great seal.[1]

§ 41. It is not so easy to ascertain the origin of the equitable or extraordinary jurisdiction of the Court of Chancery. By some persons it has been held to be as ancient as the kingdom itself.[2] Others are of a differ-

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[1] 3 Black. Comm. 46, 47; 1 Wooddes. Lect. vi. p. 159, 160; 1 Coll. Jurid. 25; Parkes, Hist. Chan. 14; 1 Reeves, Hist. 61; 2 Reeves, Hist. 250, 251. Camden, in his Britannia, p. 180, states the matter in this manner. "The Chancery drew that name from a Chancellor, which name, under the ancient Roman Emperors, was not of so great esteem and dignity, as we learn out of Vopiscus. But now-a-days a name it is of the highest honor, and Chancellors are advanced to the highest pitch of civil dignity; whose name Cassiodorus fetcheth from cross grates, or lattices, because they examined matters within places (*secretum*) severed apart, enclosed with partitions of such cross bars, which the Latins called *Cancelli*. — Regard, (saith he to a Chancellor) what name you bear. It cannot be hidden, which you do within lattices. For you keep your gates lightsome, your bars open, and your doors transparent as windows. Whereby it is very evident that he sat within grates, where he was to be seen on every side; and thereof it may be thought he took his name. But minding it was his part, being, as it were, the Prince's mouth, eye, and ear, to strike and slash out with cross lines, lattice like, those letters, commissions, warrants, and decrees, passed against law and right, or prejudicial to the Commonwealth, which, not improperly, they called to cancel, some think the name of Chancellor came from this cancelling. And in a glossary of a later time this we read. A Chancellor is he, whose office it is to look into and peruse the writings of the Emperor; to cancel what is written amiss, and to sign that which is well. However, Antiquaries differ much upon the origin of the word Chancellor. Some derive it *a cancellis*, or latticed doors, and hold, that it was a denomination of those Ushers, who had the care of the *cancelli*, or latticed doors, leading to the presence-chamber of the Emperors, and other great men. See 1 Wooddes. Lect. vi. p. 159, 160; Bythewood's Eunomus, Dial. 3, § 60, note (*a*) p. 564; Brissonius, Voce, Cancellarius. Vicat, Vocab. Voce, Cancellarius; 1 Savigny's Hist. of Roman Law, translated by Cathcart, p. 51 to 83.

[2] Com. Dig. Chancery, A. 2; Jurisd. of Chancery Vind. 1 Rep. in

ent opinion. Lambard, who (according to Lord Coke) was a keeper of the Records of the Tower, and a Master in Chancery, says, that he could not find that the Chancellor held any Court of Equity, nor that any causes were drawn before the Chancellor for help in Equity, before the time of Henry IV.; in whose days, by reason of intestine troubles, feoffments to uses did first begin, as some think.[1] Lord Coke says, it has been thought, that this Court of Equity began in the reign of Henry V., and increased in the reign of Henry VI.; but that its principal growth was during the Chancellorship of Cardinal Wolsey, in the reign of Henry VIII.[2] And he adds, in another place, that we find no cases in our books, reported before the reign of Henry VI.[3] Lord Coke's known hostility to the jurisdiction of the Court of Chancery would very much abate our

Chan. App. 9, 10; 1 Collect. Jurid. 28, 29, 30, 62; Discourses on Judicial Authority of the Master of Rolls, 2; Id. Edit. of 1728, Preface, cxi. to cxix. (ascribed to Lord Hardwicke); Barton, Equity, Introd. 2 to 13. This was Lord Hobart's opinion, (as we have seen,) who added: "That part of Equity being opposite to regular law, and, in a manner, an arbitrary discretion, is still administered by the King himself, and his Chancellor, in his name, *ab initio*, as a special trust, committed to the King, and not by him to be committed to another." Hob. Rep. 63. Camden (Brittannia, p. 181) says: "It is plain and manifest that Chancellors were in England before the Normans' Conquest. In the Vindication of the Judgment, given by King James, in the case of the Court of Chancery, (1 Collectanea Juridica, p. 23, 61, 62,) it is said; "It cannot be denied, but that the Chancery, as it judgeth in Equity, is a part of the law of the land, and of the ancient Common Law;" "for Equity is, and always hath been, a part of the law of the land."

[1] 2 Inst. 552. But see 1 Wooddes. Lect. vi. p. 176, note (*b*); Parkes, Hist. Chan. 27; Id. 34; Jurisdiction of Chan. Vind. 1 Rep. in Chan. App. 7, 8; 1 Coll. Jurid. 27; Legal. Judic. in Chan. stated (1727,) p. 28, 29.

[2] 2 Inst. 553.

[3] 4 Inst. 82.

confidence in his researches, if they were not opposed by other pressing authorities.[1]

§ 42. Lord Hale's account of the matter is as follows. "There were many petitions referred to the Council, (meaning either the *Privatum Concilium* or *Legale Concilium Regis*,) from the Parliament, sometimes the answers to particular petitions, and sometimes whole bundles of Petitions in Parliament, which, by reason of a dissolution, could not be there determined, were referred, in the close of the Parliament, sometimes to the Council in general, and sometimes to the Chancellor. And this, I take to be the true original of the Chancery Jurisdiction in matters of Equity, and gave rise to the multitude of Equitable causes, to be there arbitrarily determined." And he afterwards adds: "Touching the equitable jurisdiction, (in Chancery,) though in ancient time, no such thing was known; yet it hath now so long obtained, and is so fitted to the disposal of lands and goods, that it must not be shaken, though, in many things, fit to be bounded or reformed. Two things

[1] 3 Black. Comm. 54; 1 Collect. Jurid. 23, &c.; Com. Dig. Chancery, A. 2; 1 Wooddes. Lect. vi. p. 176, 177. Camden, (Britannia, p. 181,) says: "To this Chancellor's office, in process of time, much authority and dignity hath been adjoined by authority of Parliament; especially, ever since that lawyers stood so precisely upon the strict points of law, and caught men with the traps and snares of their law terms; that of necessity there was a Court of Equity to be erected, and the same committed to the Chancellor, who might give judgment according to equity and reason, and moderate the extremity of law, which was wont to be thought extreme wrong."

Mr. Cooper, in his *Lettres de la Cour de la Chancellarie*, (Lettr. 25, p. 182,) says, that there is not a doubt, that the jurisdiction, now exercised by the Chancellor, to mitigate the severity of the Common Law, has always been a part of the law of England. And he cites, in proof of it, the remark stated in Burnet's Life of Lord Hale, p. 106, that he (Lord Hale) did look upon Equity as a part of the Common Law, and one of the

might possibly give original [jurisdiction], or at least much contribute to its enlargement. (1.) The usual committing of particular petitions in Parliament, not there determined, unto the determination of the Chancellor, which was as frequent, as to the Council; and such a foundation being laid for a jurisdiction, it was not difficult for it to acquire more. (2.) By the invention of *uses*, (that is, *trusts*,) which were frequent and necessary, especially in the times of dissension touching the Crown. In these proceedings the Chancellor took himself to be the only dispenser of the King's conscience; and possibly the Council was not called, either as assistants, or co-judges."[1] We shall presently see, how far these suggestions have been established.

§ 43. Lord Hardwicke seems to have accounted for the jurisdiction in another manner. The Chancery is the grand *officina Justitiæ*, out of which all original writs issue under the great seal, returnable into the Courts of Common Law, to found proceedings in actions, competent to the Common Law Jurisdiction. The Chancellor, therefore, (according to Lord Hardwicke,) was the most proper judge, whether upon any petition so referred, such a writ could not be framed and issued by him, as might furnish an adequate relief to the party; and, if he found the Common Law remedies deficient, he might proceed according to the extraordinary power committed to him by the reference; *Ne Curia Regis de-*

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grounds of it. There is no doubt that this remark is well founded; but it may well be doubted, whether Lord Hale meant any thing more than a general assertion, that, in the administration of the Common Law, there often mingled equitable considerations and constructions, and not merely a strict and rigid summum jus.

[1] Parkes, Hist. Chan. App. p. 502, 503. See also Hist. Chan. (1726,) 11, 12, 13, 14; Parkes, Hist. Chan. 56.

ficeret in justitiâ exercendâ.[1] Thus, the exercise of the equitable jurisdiction took its rise from his being the proper officer, to whom all applications were made for writs, to ground actions at the Common Law; and, from many cases being brought before him, in which that law would not afford a remedy, and thereby being induced, through necessity or compassion, to extend a discretionary remedy.[2] If (Lord Hardwicke added) this account of the original of the jurisdiction in Equity in England be historically true, it will, at least, hint one answer to the question, how the forum of Common Law and the forum of Equity came to be separated with us. It was stopped at its source, and in the first instance; for if the case appeared to the Chancellor to be merely of Equity, he issued no original writ, without which the Court of Common Law could not proceed in the cause, but he retained the cognizance to himself.[3] The jurisdiction, then, may be deemed, in some sort, a resulting jurisdiction, in cases not submitted to the decision of other courts by the Crown, or Parliament, as the great fountain of justice.[4]

§ 44. Lord King (or whoever else was the author of the Treatise, entitled, The Legal Judicature in Chan-

[1] An account, nearly similar, of the Court of Chancery, is given in Bacon's Abridg. Court of Chancery, A. C.

[2] Parkes, Hist. Chan. App. p. 503, 504.

[3] Id. Rex. *v.* Hare, 1 Str. Rep. 160, 151. Per *Yorke*, arguendo.

[4] Id. 502; Hist. of Chan. (1726,) p. 9, 10, 12, 13; Parkes, Hist. of Chan. 56. — Sir James Mackintosh, in his elegant Life of Sir Thomas More, has sketched out a history of Chancery Jurisdiction, not materially different from that given by Lord Hardwicke, aided, as he was, by the later discoveries of the Commissioners of the Public Records, as stated in their printed reports. I would gladly transcribe the whole passage, if it might not be thought to occupy too large a space for a work, like the present.

cery stated,) [1] deduced the Jurisdiction of the Court of Chancery from the prerogative of the King to administer justice in his realm, being sworn by his coronation oath to deliver his subjects *æquam et rectam justitiam.* This it was impossible for him to do in person; and, therefore, of necessity, he delegated it, by several portions, to ministers and officers deputed under him. But inasmuch as positive laws must, in their nature, consist of general institutions, there were, of necessity, a variety of particular cases still happening, where no proper or adequate remedy could be given by the ordinary Courts of Justice. Therefore, to supply this want, and correct the rigor of the positive law, recourse was had to the King, as the fountain of justice, to obtain relief in such cases. The method of application was by bills or petitions to the King, sometimes in Parliament, and sometimes out of Parliament, commonly directed to him and his Council; and the granting of them was esteemed, not a matter of right, but of grace and favor. When Parliament met, there were usually petitions of all sorts, preferred to the King; and the distinguishing of these petitions, and giving proper answers to them, occasioned a weight and load of business, especially

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[1] Mr. Cooper, in his *Lettres sur la Cour de la Chancellarie*, 85, note (1), expresses a doubt, whether Lord King was the author of this pamphlet, stating, that it was written by the same person who wrote the History of the Chancery, relating to the judicial power of that Court, and the rights of the Masters, (1726.) Bishop Hurd, in his Life of Warburton, says, that they were both written by Mr. Burrough, with the aid of Bishop Warburton. The discourse of the Judicial Authority of the Master of the Rolls is said to have been written by Lord Hardwicke alone, or in conjunction with Sir Joseph Jekyll. Cooper, Lettres, &c., p. 334, App. C.; Id. p. 85, note.

when Parliament sat but a few days.[1] Accordingly, in the eighth of the reign of Edward I. an ordinance passed, by which petitions of this sort were to be referred, according to their nature, to the Chancellor, and the Justices; and, in matters of grace, to the Chancellor. And if the Chancellor and others could not do without the King, then they were to bring the matter, with their own hands, before the King, to know his pleasure. So that no petitions should come before the King and his council, but by the hands of the Chancellor and other chief ministers.[2] And hence the writer deduces the conclusion, that, at this time, all matters of grace were determinable only by the King. And he added, that he did not find any traces of a Court of Equity in Chancery, in the time of Edward II.; and that it seemed to him that the Equity side of the Court began in the reign of Edward III.;[3] when by procla-

[1] Parkes, Hist. Chan. 56.

[2] Legal Judic. in Chan. (1727,) p. 27, 28, 29. — The Ordinance, (8 Edw. I.) is cited at large in the work, The Legal Judicature, &c. p. 27, and is as follows. It recites, that the People, who came to Parliament, were often "delayed and disturbed, to the great grievance of them, and of the Court, by the multitude of Petitions laid before the King, the greatest part whereof might be dispatched by the Chancellor, and by the Justices; therefore, it is provided, that all the petitions, which concern the seal, shall come first to the Chancellor; and those which touch the Exchequer, to the Exchequer; and those, which concern the Justices, and the law of the land, to the Justices; and those, which concern the Jews, to the Justices of the Jews; and if the affairs are so great, or if they are of Grace, that the Chancellor and others cannot do it without the King, then they shall bring them with their own hands before the King, to know his pleasure; so that no petitions shall come before the King and his Council, but by the hands of his said Chancellor, and other chief ministers; so that the King and his Council may, without the load of other business, attend to the great business of his Realm, and of other foreign countries." The same ordinance will be found in Ryley, Placit. Parliam. p. 442, and Parkes, Hist. Chan. 29, 30.

[3] Legal Judic. in Chan. (1727,) p. 28.

mation, he referred matters of grace to the cognizance of the Chancellor.[1] And the jurisdiction was clearly established and acted on in the reign of Richard II.[2]

§ 45. Mr. Justice Blackstone seems to rely on the same general origin of the Jurisdiction of Chancery, as arising from the reference of petitions from the Privy Council to the Chancellor; and also from the introduc-

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[1] Id. 30, 31, (22 Edw. III.) See Parkes, Hist. Chan. 35; 1 Equity Abr. Courts, B. note (*a*). — The Proclamation is given in the Legal Judicature, &c., p. 30, 31, and in Parkes, History of Chancery, p. 35. It is as follows: "The King to the Sheriffs of London greeting — Forasmuch as we are greatly and daily busied in various affairs, concerning us and the state of our realm of England: We will, that whatsoever business, relating as well to the common-law of our kingdom, as our special grace, cognizable before us, from henceforth to be prosecuted as followeth, viz. The common-law business, before the Archbishop of Canterbury elect, our Chancellor, by him to be dispatched; and the other matters, grantable by our special grace, be prosecuted before our said Chancellor, or our well-beloved Clerk, the Keeper of the Privy Seal, so that they, or one of them, transmit to us such petitions of business, which, without consulting us, they cannot determine, together with their advice thereupon, without any further prosecution to be had before us for the same; that upon inspection thereof, we may further signify to the aforesaid Chancellor or Keeper, our will and pleasure therein; and that none other do for the future pursue such kind of business before us, we command you immediately, upon sight hereof, to make proclamation of the premises," &c. Mr. Lambard, in his work on the jurisdiction of Courts, says of the Court of Chancery, that "the King did at first determine causes in Equity in person; and about the 20th of Edward III., the King going beyond sea, delegated this power to the Chancellor;" and then, he says, "Several statutes were made to enlarge the jurisdiction of this Court, 17 Rich. II. ch. 6," &c. Bigland, arguendo, in Rex *v.* Standish, (1 Mod. R. 59.) And Bigland then adds, "But the Chancellor took not upon him, *ex officio*, to determine matters in Equity, till Edward the Fourth's time; for, till then, it was done by the King in person, who delegated to whom he pleased." This last remark seems, from the recent publication of the Record Commissioners, to be founded in error. 1 Cooper, Public Rec. p. 354, ch. 18.

[2] Id. 29, 32, 33; Parkes, Hist. Chan. 39 to 44, 54; Rex *v.* Standish, 1 Mod. R. 59; Bigland's Argument.

tion of uses of land, about the end of the reign of Edward III.[1] Mr. Wooddesson deduces the jurisdiction from the same source, and lays great stress on the proclamation of 22 Edward III.; and also on the statute of 36 Edw. III. (stat. 1, ch. 9,) which he, as well as Spelman, considers as referring many things to the sole and exclusive cognizance of the Chancellor.[2] And he adds, that it seems incontrovertible, that the Chancery exercised an equitable jurisdiction, though its practice, perhaps, was not very flourishing or frequent through the reign of Edward III.[3]

§ 46. But all our juridical Antiquaries admit that the jurisdiction of Chancery was established, and in full operation during the reign of Richard II.; and their opinions are supported by the incontrovertible facts, contained in the remonstrances, and other acts of Parliament. At this period the extensive use or abuse of the powers of Chancery had become an object of jealousy with Parliament; and various efforts were

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[1] 3 Black. Comm. 50 to 52; Parkes, Hist. Chan. 56.

[2] 1 Wooddes. Lect. vi. p. 176, and note (*f.*); 2 Inst. 553; Parkes, Hist. Chan. 35; 1 Eq. Abr. Courts, B. note (*a*).

[3] 1 Wooddes. Lect. vi. p. 178, 179 to 183; See also 7 Dane's Abridg. ch. 225, art. 4, § 1. — Mr. Reeves, in his History of the English Law, traces the origin of the Court of Chancery to the reign of Richard II.: and refers the probable origin of its jurisdiction to the reference of petitions to the Chancellor by Parliament, or by the King's Council; and conjectures, that he soon afterwards, as the King's adviser, began to grant redress, without any such reference, by the mere authority of the King. 3 Reeves, Hist. of English Law, p. 188 to 191. Mr. Jeremy, in the Introduction to his Treatise on Equity Jurisdiction (p. i. to xxi.) has given a sketch of the origin and progress of that Jurisdiction in England. It is certainly a valuable, though concise, review of it. But it does not seem to contain any remarks, important to be taken notice of, beyond what are furnished by the other authors already cited. See also Barton on Eq. Pract. Introd. p. 2 to 13.

made to restrain and limit its authority. But the Crown steadily supported it.[1] And the invention of the writ of subpœna by John Waltham, Bishop of Salisbury, who was Keeper of the Rolls, about the 5th of Richard II., gave great efficiency, if not expansion, to the jurisdiction.[2] In the 13th of Richard II., the Commons prayed, that no party might be required to answer before the Chancellor, or the Council of the King, for any matter where a remedy is given by the Common Law, unless it be by writ of *scire facias* in the County where it is found, by the Common Law. To which the King answered, that he would preserve his royalty, as his progenitors had done before him.[3] And the only redress granted was by Stat. 17 Rich. II., ch. 6, by which it was enacted, that the Chancellor should have power to award damages to the Defendant, in case the suggestions of the bill were untrue, according to his discretion.[4] The struggles upon this subject were maintained in the subsequent reigns of Henry IV. and V. But the Crown resolutely resisted all appeals against the jurisdiction; and finally, in the time of

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[1] Parkes, Hist. Chan. 39 to 44.

[2] 3 Reeves, Hist. 192 to 194; Id. 274, 379, 380, 381; 3 Black. Comm. 52; Bac. Abr. Court of Chancery, C. — In the third year of the reign of Henry V., the Commons, in a petition to the King, declared themselves aggrieved by writs of subpœna, sued out of Chancery for matters determinable at the Common Law, "which were never granted, or used, before the time of the late King Richard, when John Waltham, heretofore Bishop of Salisbury, of his craft, made, formed and commenced such innovations." Parkes, Hist. Chan. 47, 48; 1 Wooddes. Lect. vi. p. 183, 184. See also Gilb. Forum Roman. 17.

[3] Parkes, Hist. Chan. 41; 4 Inst. 82.

[4] Parkes, Hist. Chan. 41, 42; 3 Black. Comm. 52; 4 Inst. 82, 83; 1 Wooddes. Lect. vi. p. 183; 2 Reeves, Hist. 194.

Edward IV., the process by bill and subpœna was become the daily practice of the Court.[1]

§ 47. Considerable new light has been thrown upon the subject of the origin and antiquity of the equitable jurisdiction of the Court of Chancery, by the recent publication of the labors of the Commissioners on the Public Records. Until that period, the notion was very common, (which was promulgated by Lord Ellesmere,) that there were no petitions of the Chancery remaining in the office of record, before the 15th year of the reign of Henry VI. But it now appears, that many hundreds have been lately found among the records of the Tower for nearly fifty years antecedent to the period mentioned by Lord Ellesmere, and commencing about the time of the passage of the statute of 17 Rich. II., ch. 6.[2] But there is much reason to believe, that, upon suitable researches, many petitions or bills, addressed to the Chancellor, will be found of a similar character during the reigns of Edward I., Edward II., and Edward III.[3]

[1] 3 Black. Comm. 53; Parkes, Hist. Chan. 45 to 57; 1 Wooddes. Lect. vi. p. 183 to 186; 3 Reeves, Hist. 193, 194, 274, 379, 380.

[2] 1 Cooper, Pub. Rep. 355. — I extract this statement from the Preface to the Calendars of the Proceedings in Chancery, &c., published by the Record Commissioners in 1827, and now before me. That Preface is signed by John Bayley, Sub-Commissioner. But it would seem, that it was in fact drawn up by Mr. Lysons, more than ten years before. Mr. Cooper, in his very valuable account of the Public Records, has published this preface verbatim; and has also extracted a Letter of Mr. Lyson's, written on the same subject in 1816. The preface and letter seem almost identical in language. 1 Cooper, Pub. Rec. ch. 18, p. 354; Id. 384, note (b); Id. 455 to 458. — In the English Quarterly Jurist, for January, 1828, there will be found, in a review of these Calendars, a very succinct, but interesting account of the contents of the early Chancery Cases, printed by the Record Commissioners.

[3] Mr. Cooper says, that he "has made some inquiries, which induce him to think that there still exist among the records at the Tower many

§ 48. From the proceedings, which have been published by the Record Commissioners, it appears, that the chief business of the Court of Chancery in those early times did not arise from the introduction of uses of land, according to the opinion of most writers on the subject. Very few instances of applications to the Chancellor on such grounds occur among the proceedings of the Chancery during the first four or five reigns after the equitable jurisdiction of the Court seems to have been fully established. Most of these ancient petitions appear to have been presented in consequence of assaults, and trespasses, and a variety of outrages, which were cognizable at Common Law; but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the County in which they occurred.[1]

petitions, or bills, addressed to the Chancellor, during the reigns of Edw. I., Edw. II., and Edw. III., similar to those addressed to that Judge, during the reign of Richard II., selections from which have been printed. Upon a very slight research, several documents of this description are stated to have been discovered; but only one of them has been seen by the compiler. It is dated the 38th year of Edward III." 1 Cooper, Publ. Rec. Addenda, p. 454, 455. — Mr. Barton says, that, so early as the reign of Edward I., the Chancellor began to exercise an original and independent jurisdiction, as a Court of Equity, in contradistinction to a Court of Law. Barton on Eq. Pr. Introd. p. 7.

[1] This passage is a literal transcript from the Preface to the Calendars in Chancery; and it is fully borne out by the examples of those bills and petitions, given at large in the same work. Mr. Cooper, in his own work on the Public Records, has given an abstract, or marginal note, of all the examples thus given, from the reign of Richard II. to the reign of Richard III., amounting in number to more than one hundred. 1 Cooper, Pub. Rec. 359, 373; Id. 377 to 385. — As we recede from the reign of Richard II and advance to modern times, the cases become of a more mixed character, and approach to those now entertained in Chancery.

§ 49. If this be a true account of the earliest known exercises of equitable jurisdiction, it establishes the point that it was principally applied to remedy defects in the Common-Law proceedings; and, therefore, that Equity Jurisdiction was entertained upon the same ground which now constitutes the principal reason of its interference, namely, that a wrong is done, for which there is no plain, adequate, and complete remedy in the Courts of Common Law.[1] And in this way great strength is added to the opinions of Lord Hale and Lord Hardwicke, that its jurisdiction is in reality the residuum of that of the *Commune Concilium* or *Aula Regis*, not conferred on other Courts, and necessarily exercisable by the Crown, as a part of its duty and prerogative to administer Justice and Equity.[2] The introduction of Uses or Trusts at a later period, may have given new activity and extended operation to the jurisdiction of the Court; but it did not found it. The redress given by the Chancellor in such cases, was merely a new application of the old principles of the Court; since there was no remedy at law to enforce the observance of such uses or trusts.[3]

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[1] See Treatise on Subpœna, ch. 2; Harg. Law Tracts, p. 333, 334.

[2] See Eunomus, Dial. 3, § 60; 1 Eq. Abrid. Courts, B. note (*a*). Ante, § 42. See the British and Foreign Quarterly Review, No. 27, Dec. 1842, pp. 167, 168, 172, 173.

[3] See 3 Black. Comm. 52; 3 Reeves, Hist. 379, 381; 1 Wooddes. Lect. vi. p. 174, 176, 178, 182; Eunomus, Dial. 3, § 60; Parkes, Hist. Chan. 28 to 31. — The view which is here taken of the subject is confirmed by the remarks of the Commissioners, under the Chancery Commission, in the 50th George III., whose Report was afterward published by Parliament in 1826. The passage to which allusion is made, is as follows. "The proceedings in the Courts of Common Law are simple, and generally founded on certain writs of great antiquity, conceived in prescribed forms. This adherence to prescribed forms has been considered, as important to the due administration of justice in common cases. But,

§ 50. From this slight review of the origin and progress of equitable jurisdiction in England, it cannot escape observation how naturally it grew up, in the same manner, and under the same circumstances, as the equitable jurisdiction of the Prætor at Rome. Each of them arose from the necessity of the thing in the actual administration of justice, and from the deficiencies of the positive law, (the *lex scripta*,) or from the inadequacy of the remedies in the prescribed forms to meet the full exigency of the particular case. It was not an usurpation for the purpose of acquiring and exercising power; but a beneficial interposition, to correct gross

in progress of time, cases arose in which full justice could not be done in the Courts of Common Law, according to the practice then prevailing. And, for the purpose of obtaining an adequate remedy, in such cases, resort was had to the extraordinary jurisdiction of the Courts of Equity, which alone had the power of examining the party on oath, and thereby acting through the medium of his conscience, and of procuring the evidence of persons, not amenable to the jurisdiction of the Courts of Common Law, and whose evidence therefore it was, in many cases, impossible to obtain without the assistance of a Court of Equity. The application to this extraordinary jurisdiction, instead of being in the form of a Writ, prescribed by settled law, seems always to have been in the form of a petition of the party or parties aggrieved, stating the grievance, the defect of remedy by proceedings in the Courts of Common Law, and the remedy, which, it was conceived, ought to be administered. This mode of proceeding unavoidably left every complaining party to state his case, according to the particular circumstances, always asserting that the party was without adequate remedy at the Common Law." The Reviewer of the Early Proceedings in Chancery in the English Jurist, for January, 1828, concludes his observations in the following manner: "It is, we think, established to demonstration, that the general jurisdiction of the Court was derived from that extensive judicial power, which, in early times, the King's ordinary Council had exercised; but that it arose gradually and insensibly, as circumstances occurred, and occasions seemed to demand it; and that, having so arisen, it afterwards settled down by equally slow degrees, and in consequence of occasional resistance, excited to its encroaching and despotic spirit, appears to us to be equally as demonstrable." 1 English Quarterly Jurist, p. 350.

injustice, and to redress aggravated and intolerable grievances.[1]

§ 51. But, be the origin of the Equity Jurisdiction of the Court of Chancery what it may, from the time of the reign of Henry VI., it constantly grew in importance;[2] and, in the reign of Henry VIII., it expanded into a broad and almost boundless jurisdiction under the fostering care, and ambitious wisdom, and love of power of Cardinal Wolsey.[3] Yet, (Mr. Reeves observes,) after all, notwithstanding the complaints of the Cardinal's administration of justice, he has the reputation of having acted with great ability in the office of Chancellor, which lay heavier upon him than it had upon any of his predecessors, owing to the too great care with which he entertained suits, and the extraordinary influx of business, which might be attri-

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[1] 1 Kames on Equity, Introd. p. 19; Butler's Horæ Jurid. § v. 3, p. 43 to 46; Id. App. note, 3, p. 130.—Those who have a curiosity to trace the origin and history of the Prætor's authority in Rome, and the gradual development, or assumption of jurisdiction by him, will find ample means for this purpose in Taylor's Elements of the Civil Law, p. 210 to 216, and in Heineccius De Edictis Prætorum, Lib. 1, cap. 6, per tot. The same complaints were made at Rome as in England, of the excess and abuse of authority by the Prætors; and the complaints commonly ended in the same way. The jurisdiction was occasionally restricted; but it was generally confirmed. See Butler's Horæ Jurid. § v. 3; p. 43 to 46.

[2] Parkes, Hist. Chan. 55, 56; 3 Reeves, Hist. 379 to 382.

[3] 4 Reeves, Hist. 368, 369; Parkes, Hist. Chan. 61, 62; 4 Inst. 91, 92.—It seems that the first delegation of the powers of the Lord Chancellor to Commissioners was in the time of Cardinal Wolsey. It will be found in Rymer's Fœdera, tom. 14, p. 299; Parkes, Hist. of Chan. 60, 61. It was in the same reign that the Master of the Rolls, (it is said,) under a like appointment, first set apart, and used to hear causes at the Rolls in the afternoon. The Master, who thus first heard causes, was Cuthbert Tunstall. 4 Reeves, Hist. of the Law, 368, 369; 5 Reeves, Hist. 160. But see Discourse on the Judicial Authority of the Master of the Rolls, (1728,) § 3, p. 83, &c.; Id. § 4, p. 110, &c., ascribed to Sir Joseph Jekyll.

buted to other causes.[1] Sir Thomas More, the successor to the Cardinal, took a more sober and limited view of Equity Jurisprudence, and gave public favor as well as dignity to the decrees of the Court. But still there were clamors from those who were hostile to Equity during his time; and especially to the power of issuing injunctions to judgments and other proceedings in order to prevent irreparable injustice.[2] This controversy was renewed with much greater heat and violence in the reign of James I. upon the point, whether a Court of Equity could give relief for or against a judgment at Common Law; and it was mainly conducted by Lord Coke against, and by Lord Ellesmere in favor of the Chancery jurisdiction. At last the matter came directly before the King, and, upon the advice and opinion of very learned lawyers, to whom he referred it, his Majesty gave judgment in favor of the equitable jurisdiction in such cases.[3] Lord Bacon

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1 4 Reeves, Hist. 370.

2 Sir James Mackintosh's Life of Sir Thomas More; 4 Reeves, Hist. 370 to 376; Parkes, Hist. Chan. 63 to 65.

3 1 Collect. Jurid. 23, &c.; 1 Wooddes. Lect. vi. p. 186; 3 Black. Comm. 54; Parkes, Hist. Chan. 80. — The controversy gave rise to many pamphlets, not only at the time, but in later periods. The learned reader, who is inclined to enter upon the discussion of these points, now of no importance, except as a part of the juridical history of England, may consult advantageously the following works. Observations concerning the Office of Lord Chancellor, published in 1651, and ascribed (though it is said incorrectly) to Lord Ellesmere. (Discourse concerning the Judicial Authority of the Master of Rolls, 1728, p. 51.) A Vindication of the Judgment of King James, &c., printed in an Appendix to the first volume of Reports in Chancery, and in 1 Collect. Jurid. 23, &c.; the several Treatises on the Writ of Subpœna in Chancery, and the Abuses and Remedies in Chancery, in Hargrave's Law Tracts, p. 321, 425; and 4 Reeves, Hist. of the Law, p. 370 to 377; 2 Swanst. 24, note. — There is a curious anecdote related of Sir Thomas More, who invited the Judges to dine with him, and after dinner, showed them the number and nature of

succeeded Lord Ellesmere; but few of his decrees, which have reached us, are of any importance to posterity.[1] But his celebrated Ordinances for the regulation of Chancery gave a systematical character to the business of the Court; and some of the most important of them (especially as to Bills of Review) still constitute the fundamental principles of its present practice.[2]

§ 52. From this period, down to the time when Sir Heneage Finch (afterwards Earl of Nottingham) was elevated to the Bench, (in 1673,) little improvement was made, either in the principles or in the practice of Chancery;[3] and none of the persons who held the seal, were distinguished for uncommon attainments or learning in their profession.[4] With Lord Nottingham, a new era commenced. He was a person of eminent abilities, and the most incorruptible integrity. He possessed a fine genius, great liberality of views, and a thorough comprehension of the true principles of Equity; so that he was enabled to disentangle the doctrines from any narrow and technical notions, and to expand the remedial justice of the Court far beyond the aims of his predecessors. In the course of nine years, during which he presided in the Court, he built up a system of Jurisprudence and Jurisdiction upon wide and rational foundations which served as a model for succeeding Judges,

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the causes in which he had granted injunctions to judgments of the Court of Common Law; and the Judges, upon full debate of the matters, confessed that they could have done no otherwise themselves. The anecdote is given at large in Mr. Cooper's *Letters sur la Cour de la Chancellerie*, Lett. 25, p. 185, note 1, from Roper's Life of Sir Thomas More.

1 3 Black. Comm. 35.

2 See Bacon's Ord. in Chancery, by Beames.

3 3 Black. Comm. 55.

4 See Parkes, Hist. Chan. 92 to 210.

and gave a new character to the Court;[1] and hence he has been emphatically called "The father of Equity."[2] His immediate successors availed themselves very greatly of his profound learning and judgment. But a successor was still wanted, who, with equal genius, abilities, and liberality, should hold the seals for a period long enough to enable him to widen the foundation, and complete the structure, begun and planned by that illustrious man. Such a successor at length appeared in the person of Lord Hardwicke. This great Judge presided in the Court of Chancery during the period of twenty years; and his numerous decisions evince the most thorough learning, the most exquisite skill, and the most elegant juridical analysis. There reigns, throughout all of them, a spirit of conscientious and discriminating Equity, a sound and enlightened judgment, as rare, as it is persuasive, and a power of illustration from analogous topics of the law, as copious, as it is exact and edifying. Few Judges have left behind them a reputation more bright and enduring; few have had so favorable an opportunity of conferring lasting benefits upon the jurisprudence of their country; and still fewer have improved it by so large, so various, and so important contributions. Lord Hardwicke, like Lord Mansfield, combined with his judicial character, the still more embarrassing character of a statesman, and in some sort of a Minister of State. Both of them, of course, encountered great political opposition (whether rightly or wrongly,

[1] Mr. Justice Blackstone has pronounced a beautiful eulogy on him, in 3 Black. Comm. 56, from which the text is, with slight alterations, borrowed. See also 4 Black. Comm. 442.

[2] 1 Madd. Ch. Pr. Preface, 13. See Parkes, Hist. Chan. 211, 212, 213, 214; 1 Kent, Comm. Lect. 21, p. 492, (2d edition.)

it is beside the purpose of this work to inquire); and it is fortunate for them, that their judicial labors are embodied in solid volumes, so that, when the prejudices and the passions of the times are passed away, they may remain open to the severest scrutiny, and claim from posterity a just and unimpeachable award.[1]

§ 53. This short and imperfect sketch of the origin and history of Equity Jurisdiction in England will be here concluded. It has not been inserted in this place from the mere desire to gratify those whose curiosity may lead them to indulge in antiquarian inquiries, laudable and interesting as it may be. But it seemed, if not indispensable, at least important, as an introduction to a more minute and exact survey of that jurisdiction, as administered in the present times. In the first place, without some knowledge of the origin and history of Equity Jurisdiction, it will be difficult to ascertain the exact nature and limits of that jurisdiction; and how it can, or ought to be, applied to new cases, as they arise. If it be a mere arbitrary, or usurped jurisdiction, standing upon authority and practice, it should be confined within the very limits of its present range; and the

[1] See 1 Kent, Comm. Lect. 21, p. 494, (2d edit.) and Lord Kenyon's opinion in Goodtitle v. Otway, 7 T. R. 411. — Mr. Charles Butler, in his Reminiscences, has given a sketch of Lord Hardwicke and Lord Mansfield, which no lawyer can read without high gratification. Few men were better qualified to judge of their attainments. 1 Butler's Reminis. § 11, n. 1, 2, p. 101 to 116. Lord Eldon, in Ex parte Greenway, 8 Ves. R. 312, said, "He (Lord Hardwicke,) was one of the greatest Judges that ever sat in Westminster Hall." Those who wish to form just notions of the great Chancellors of succeeding times, down to our own, may well consult the same interesting pages in which Lord Camden, Lord Thurlow, Lord Roslyn, Sir William Grant, and, though last, not least, the venerable Lord Eldon, are spoken of in terms of high, but discriminating praise. See 4 Kent's Comm. Lect. 21, p. 494, 495, (2d edit.)

terra incognita, and the *terra prohibita*, ought to be the same, as to its boundaries. If, on the other hand, its jurisdiction be legitimate, and founded in the very nature of remedial justice, and in the delegation of authority in all cases, where a plain, adequate, and complete remedy does not exist in any other Court, to protect acknowledged rights, and to prevent acknowledged wrongs, (that is, acknowledged in the Municipal Jurisprudence,) then it is obvious, that it has an expansive power, to meet new exigencies; and the sole question, applicable to the point of jurisdiction, must from time to time, be, whether such rights and wrongs do exist, and whether the remedies therefor in other Courts, and especially in the Courts of Common Law, are full, and adequate to redress them. If the present examination (however imperfect) has tended to any result, it is to establish, that the latter is the true and constitutional predicament and character of the Court of Chancery.

§ 54. In the next place, a knowledge of the origin and history of Equity Jurisdiction will help us to understand, and in some measure, to explain, as well as to limit, the anomalies, which do confessedly exist in the system. We may trace them back to their sources, and ascertain how far they were the result of accidental, or political, or other circumstances; of ignorance, or perversity, or mistake in the Judges; of imperfect development of principles; of narrow views of public policy; of the seductive influence of prerogative; or, finally, of a spirit of accommodation to the institutions, habits, laws or tenures of the age, which have long since been abolished, but have left the scattered fragments of their former existence behind them. We shall thus be enabled to see more clearly, how far the operation of these anomalies should be strengthened or widened;

when they may be safely disregarded, in their application, to new cases and new circumstances; and when, though a deformity in the general system, they cannot be removed, without endangering the existence of other portions of the fabric, or interfering with the proportions of other principles, which have been moulded and adjusted with reference to them.

§ 55. In the next place, such a knowledge will enable us to prepare the way for the gradual improvement, as well of the science itself, as of the system of its operations. Changes in law, to be safe, must be slowly and cautiously introduced and thoroughly examined. He who is ill-read in the history of any law, must be ill-prepared to know its reasons as well as its effects. The causes or occasions of laws are sometimes as important to be traced out as their consequences. The new remedy to be applied may, otherwise, be as mischievous as the wrong to be redressed. History has been said to be philosophy teaching by examples; and to no subject is this remark more applicable than to law, which is emphatically the science of human experience. A sketch, however general, of the origin and sources of any portion of jurisprudence, may at least serve the purpose of pointing out the paths to be explored; and, by guiding the inquirer to the very places he seeks, may save him from the labor of wandering in the devious tracks, and of bewildering himself in mazes of errors as fruitless as they may be intricate.

§ 56. In America, Equity Jurisprudence had its origin at a far later period than the jurisdiction properly appertaining to the Courts of Common Law. In many of the Colonies, during their connection with Great Britain, it had either no existence at all, or a

very imperfect and irregular administration.[1] Even since the Revolution, which severed the ties which bound us to the parent country, it has been of slow growth and cultivation; and there are still some States in whose municipal jurisprudence it has no place at all, or no place as a separate and distinct science. Even in those States in which it has been cultivated with the most success, and for the greatest length of time, it can scarcely be said to have been generally studied or administered, as a system of enlightened and exact principles, until about the close of the eighteenth century.[2] Indeed, until a much later period, when Re-

[1] Equity Jurisprudence scarcely had an existence, in any large and appropriate sense of the terms, in any part of New England, during its Colonial state. (1 Dane, Abridg. ch. 1, art. 7, § 51; 7 Dane, Abridg. ch. 225, art. 1, 2.) In Massachusetts and Rhode Island, it still has but a very limited extent. In Maine and New Hampshire, more general Equity powers have been, within a few years, given to their highest Courts of Law. In Vermont and Connecticut it had an earlier establishment; in the former State, since the Revolution; and in the latter, a short time before the Revolution. 2 Swift, Dig. p. 15, edit. 1823. In Virginia, there does not seem to have been any Court, having Chancery powers, earlier than the Act of 1700, ch. 4, (3 Tucker's Black. App. 7.) In New York, the first Court of Chancery was established in 1701; but it was so unpopular, from its powers being vested in the Governor and Council, that it had very little business until it was reorganized in 1778. (1 John. Ch. Rep. Preface; Campb. and Camb. American Chancery Digest, Preface. 6; Blake's Chan. Introduct. viii.) In New Jersy, it was established in 1705, (1 Fonbl. Eq. by Laussat, edit. 1831, p. 14, note.) Mr. Laussat, in his Essay on Equity, in Pennsylvania, (1826,) has given an account of its origin, and progress, and present state, in that Commonwealth, (p. 16 to 31.) From this account we learn that the permanent establishment of a Court of Equity was successfully resisted by the people during the whole of its Colonial existence; and that the year 1790 is the true point at which we must fix the establishment of Equity in the Jurisprudence of Pennsylvania. It has since been greatly expanded by some legislative enactments. See, also, 7 Dane, Abridg. ch. 225, art. 1, 2.

[2] 1 Dane, Abridg. ch. 1, art. 7, § 51; 7 Dane, Abridg. ch. 225, art. 1, 2.

ports were regularly published, it scarcely obtained the general regard of the profession beyond the purlieus of its immediate officers and ministers. Even in the State of New York, whose rank in jurisprudence has never been second to that of any State in the Union, (if it has not been the first among its peers,) Equity was scarcely felt in the general administration of justice, until about the period of the Reports of Caines and of Johnson. And, perhaps, it is not too much to say, that it did not attain its full maturity and masculine vigor, until Mr. Chancellor Kent brought to it the fulness of his own extraordinary learning, unconquerable diligence, and brilliant talents. If this tardy progress has somewhat checked the study of the beautiful and varied principles of Equity in America, it has on the other hand enabled us to escape from the embarrassing effects of decisions which might have been made at an earlier period, when the studies of the profession were far more limited, and the Benches of America were occasionally, like that of the English Chancery in former ages, occupied by men, who, whatever might have been their general judgment or integrity, were inadequate to the duties of their stations, from their want of learning, or from their general pursuits. Indeed, there were often other circumstances which greatly restricted or impeded a proper choice; such as the want of the due enjoyment of executive or popular favor by men of the highest talents, or the discouragement of a narrow and incompetent salary.

§ 57. The Equity Jurisprudence, at present exercised in America, is founded upon, coextensive with, and, in most respects, conformable to, that of England. It approaches even nearer to the latter than the juris-

diction exercised by the Courts of Common Law in America, approaches to the Common Law, as administered in England. The Common Law was not in many particulars applicable to the situation of our country when it was first introduced. Whereas, Equity Jurisprudence, in its main streams, flows from the same sources here that it does in England, and admits of an almost universal application in its principles. The Constitution of the United States has, in one clause, conferred on the National Judiciary cognizance of cases in Equity as well as in Law; and the uniform interpretation of that clause has been, that, by cases in Equity are meant cases, which, in the Jurisprudence of England, (the parent country,) are so called, as contradistinguished from cases at the Common Law.[1] So that, in the Courts of the United States, Equity Jurisprudence generally embraces the same matters of jurisdiction and modes of remedy as exist in England.[2]

§ 58. In nearly all the States in which Equity Jurisprudence is recognized, it is now administered in the modes, and according to the forms which appertain to it in England, that is, as a branch of jurisprudence, separate and distinct from the remedial justice of Courts of Common Law.[3] In Pennsylvania it was formerly administered through the forms, remedies, and proceedings of the Common Law; and was thus mixed up with legal rights and titles in a manner not easily

[1] Robinson *v.* Campbell, 3 Wheaton, R. 212, 221, 223; Parsons *v.* Bradford, 3 Peters, Sup. Ct. R. 433, 447; 3 Story, Comm. on Const. 506, 507; Id. 644, 645; U. S. *v.* Howland, 4 Wheaton, R. 115; 7 Dane, Abridg. ch. 225, art. 1.

[2] See Foster *v.* Swasey, 2 Wood. & Min. 219.

[3] Fonblanq. on Eq. by Laussat, (edit. 1831,) p. 13 to 20; 7 Dane's Abridg. ch. 225, art. 1, 2.

comprehensible elsewhere.[1] This anomaly has been in a considerable degree removed by some recent legislative enactments. In some of the States in the Union, distinct Courts of Equity are established; in others, the powers are exercised concurrently with the Common Law Jurisdiction by the same tribunal, being at once a Court of Law and a Court of Equity, somewhat analogous to the case of the Court of Exchequer in England. In others, again, no general Equity powers exist; but a few specified heads of Equity Jurisprudence are confided to the ordinary Courts of Law, and constitute a limited statutable jurisdiction.[2]

[1] Id. 18 to 20.

[2] Mr. Chancellor Kent, in a note to his Commentaries, has given a brief statement of the actual organization of Equity Jurisdiction in all the States; to which I gladly refer the learned reader. 4 Kent, Comm. Lect. 58, p. 163, note (*d*). A fuller account may be found in the preface to Campbell and Cambreleng's American Chancery Digest, (edit. 1828,) in Mr. Laussat's Edition of Fonblanque on Equity, vol. 1, p. 11 to 20 (edit. 1831); and in Mr. Laussat's Essay on Equity in Pennsylvania, App. (1826.) As the systems of the different States are, in many cases, subject to legislative authority, which is frequently engaged in introducing modifications, a more minute detail would scarcely be of any permanent importance to the profession. The article on Chancery Jurisdiction, in the first volume of the American Jurist, p. 314, contains many very valuable suggestions on this subject; and exhibits, in a striking manner, the importance of Equity Jurisprudence. See, also, 7 Dane's Abridg. ch. 225, art. 1, 2.

CHAPTER III.

GENERAL VIEW OF EQUITY JURISDICTION.

§ 59. HAVING traced out the nature and history of Equity Jurisprudence, we are naturally led to the consideration of the various subjects which it embraces, and the measure and extent of its jurisdiction. Courts of Equity, in the exercise of their jurisdiction, may, in a general sense, be said to differ from Courts of Common Law, in the modes of trial, in the modes of proof, and in the modes of relief. One or more of these elements will be found essentially to enter, as an ingredient, into every subject over which they exert their authority. Lord Coke has, in his summary manner, stated, that three things are to be judged of in the Court of Conscience or Equity, covin, accident, and breach of confidence;[1] or, as we should now say, matters of fraud, accident, and trust. Mr. Justice Blackstone has also said, that Courts of Equity are established, "to detect latent frauds and concealments which the process of the Courts of Law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a Court of Law; to deliver from such dangers, as are owing to misfor-

[1] 4 Inst. 84; Com. Dig. Chancery, Z.; 3 Black. Comm. 431; 1 Eq. Abr. Courts, B. § 4, p. 130; 1 Dane's Abridg. ch. 9, art. 1. § 3; Earl of Bath *v.* Sherwin, Prec. Ch. 261; S. C. 1 Bro. Parl. Cas. 266; Rex *v.* Hare & Mann, 1 Str. 149, 150, Yorke, arguendo; 1 Wooddes. Lect. vii. p. 208, 209; Bac. Abridg. Court of Chancery, C.

tune, or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or Common Law." [1]

§ 60. These, as general descriptions, are well enough; but they are far too loose and inexact to subserve the purposes of those who seek an accurate knowledge of the actual, or supposed, boundaries of Equity Jurisdiction. Thus, for example, although fraud, accident, and trust are proper objects of Courts of Equity, it is by no means true, that they are exclusively cognizable therein. On the contrary, fraud is, in many cases, cognizable in a Court of Law. Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee, or by a stranger, avoids it as to the other party at law.[2] And, sometimes, fraud, such as fraud in obtaining a will, or devise of lands, is exclusively cognizable there.[3] Many cases of accident are remediable at law, such as losses of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in Equity, are sometimes cognizable at law; as, for instance, cases of bailments, and that larger class of cases, where the action for money had and received for another's use is maintained *ex æquo et bono*.[4]

[1] 1 Black. Comm. 92; and see 3 Black. Comm. 429 to 432.

[2] Thoroughgood's case, 2 Co. 9 a.; Hobart, R. 296; Id. 126, 330, 426; Shutter's case, 12 Co. R. 90; Jenkin's Cent. 166.

[3] 1 Hovenden on Frauds, Introd. p. 16; Id. ch. 10, p. 252; 1 Dane, Abridg. ch. 9, art. 1, § 3; 3 Wooddes. Lect. lvi. p. 477.

[4] 3 Black, Comm. 431, 432; 1 Wooddes. Lect. vii. p. 208, 209.

§ 61. On the other hand, there are cases of fraud, of accident, and of trust, which neither Courts of Law, nor of Equity, presume to relieve, or mitigate.[1] Thus, a man may most unconscientiously wage his law in an action of debt; and yet, the aggrieved party will not be relieved in any Court of Law or Equity.[2] And, where the law has determined a matter, with all its circumstances, Equity cannot (as we have seen) intermeddle against the positive rules of law.[3] And, therefore, Equity will not interfere in such cases, notwithstanding accident, or unavoidable necessity.[4] This was long ago remarked by Lord Talbot, who, after saying: "There are instances, indeed, in which a Court of Equity gives remedy, where the law gives none," added. "But where a particular remedy is given by law, and that remedy is bounded and circumscribed by particular rules, it would be very improper for this Court to take it up, where the law leaves it, and extend it further than the law allows."[5] And upon this ground, relief was refused to a creditor of the wife against her husband after her death, though he had received a large fortune with her on his marriage.[6] So, a man may by accident omit to make a will, appointment, or gift, in favor of some friend or relative; or he may leave his will unfinished; and yet there can be no relief.[7] And many cases of the non-

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1 1 Fonbl. Eq. B. 1, ch. 1, § 3, p. 16.

2 Francis, Max. Introd. 6, 7.

3 1 Fonbl. Eq. B. 1, ch. 1, § 3; 1 Hovend. on Frauds, Introd. p. 12, 13.

4 Ibid.; 1 Dane's Abridg. ch. 9, art. 1, § 2.

5 Heard *v.* Stamford, Cas. Temp. Talb. 174.

6 Ibid.

7 See Whitten *v.* Russell, 1 Atk. 448, 449; 1 Madd. Ch. Pr. 39; Id.

performance of conditions precedent are equally without redress.[1] So, cases of trust may exist, in which the parties must abide by their own false confidence in others, without any aid from Courts of Justice. Thus, in cases of illegal contracts or those in which one party has placed property in the hands of another for illegal purposes, as for smuggling, if the latter refuses to account for the proceeds, and fraudulently or unjustly withholds them, the former must abide by his loss; for, *In pari delicto melior est conditio possidentis, et defendentis*, is a maxim of public policy equally respected in Courts of Law and Courts of Equity.[2] And, on the other hand, where the fraud is perpetrated by one party only, still, if it involves a public crime, and redress cannot be obtained, except by a discovery of the facts from him personally, the law will not compel him to accuse himself of a crime; and therefore the case is one of irremediable injury.[3]

§ 62. These are but a few among many instances, which might be selected, to establish the justice of the remark, that, even in cases professedly within the scope of Equity Jurisdiction, such as fraud, accident, and

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15, 46; 1 Wooddes. Lect. vii. p. 214; Com. Dig. Chancery, 3 F. 8; 1 Fonbl. B. 1, ch. 3, § 7, and note (*x*); Francis, Max. M. 9, § 4.

[1] 1 Madd. Ch. Pr. 35; Popham *v.* Bamfield, 1 Vern. R. 83; Lord Falkland *v.* Bertie, 2 Vern. 333; 7 Dane's Abridg. ch. 225, art. 4, § 6.

[2] Holman *v.* Johnson, Cowper, R. 341; Armstrong *v.* Toler, 11 Wheaton, R. 258; Hannay *v.* Eve, 3 Cranch, R. 242; Grounds and Rudim. of the Law, M. 317, p. 260, edit. 1751; 7 Dane's Abridg. ch. 226, art. 18; Smith *v.* Bromley, Doug. R. 696, note. The civil law has a like maxim; — Paria delicta mutuâ compesatione tolluntur. Breviar. Advocat. title Delictum. Paria sunt non esse aliquid, vel non esse legitimè. Id. Paria; Batty *v.* Chester, 5 Beavan, R. 103.

[3] Grounds and Rudim. of the Law, Introd. 6, 7; Id. M. 306, p. 225, edit. 1751; 2 Fonbl. Eq. B. 6, ch. 3, § 5.

trust, there are many exceptions; and that all that can be ascribed to such general allegations, is general truth.[1] The true nature and extent of Equity Jurisdiction, as at present administered, must be ascertained by a specific enumeration of its actual limits in each particular class of cases, falling within its remedial justice.[2] This will, accordingly, be done in the subsequent pages.

§ 63. Before proceeding, however, to this distribution of the subject, it may be well to take notice of some few maxims and rules of a general nature, which are of constant and tacit, and sometimes of express, reference in most of the discussions arising in Equity, in order that we may understand the true nature and extent of the meaning attached to them.

§ 64. In the first place, it is a common maxim, that Equity follows the law, *Æquitas sequitur legem*.[3] This maxim is susceptible of various interpretations. It may mean, that Equity adopts and follows the rules of law in all cases, to which those rules may, in terms, be applicable; or it may mean, that Equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law.[4] Now,

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[1] See Com. Dig. Chancery, 3 F. 1 to 9; 7 Dane's Abridg. ch. 225, § 6; 1 Wooddes. Lect. vii. p. 200 to 215. See Clough *v.* Ratcliffe, 1 De Gex & Smale, R. 164.

[2] Dr. Dane, in his Abridgment and Digest, has devoted two large chapters to the consideration of the System and Practice of Equity, especially in the Courts of the United States. The diligent student will not fail to avail himself of this ample source of information. 7 Dane's Abridg. ch. 225, 226, from p. 516 to 639.

[3] 1 Dane's Abridg. ch. 9, art. 1, § 2; Grounds and Rudim. of the Law, M. 9, (edit. 1751.) See Earl of Bath *v.* Sherwin, 10 Mod. R. 1, 3; Cowper *v.* Cowper, 2 P. Will. 753.

[4] 3 Woodes. Lect. lvi. p. 479 to 482.

the maxim is true in both of these senses, as applied to different cases and different circumstances. It is universally true in neither sense; or, rather, it is not of universal application.[1] Where a rule, either of the Common or the Statute Law, is direct, and governs the case with all its circumstances, or the particular point, a Court of Equity is as much bound by it, as a Court of Law, and can as little justify a departure from it.[2] If the law commands, or prohibits a thing to be done, Equity cannot enjoin the contrary, or dispense with the obligation. Thus, since the law has declared, in England, that the eldest son shall take by descent the whole undevised estate of his parent, a Court of Equity cannot disregard the canon of descent; but must give full effect and vigor to it in all controversies, in which the title is asserted.[3] And yet, there are cases in which Equity will control the legal title of an heir, general or special, when it would be deemed absolute at law; and in which, therefore, so far from following the law, it openly abandons it. Thus, if a tenant in tail, not knowing the fact, should, upon his marriage, make a settlement on his wife, and the heir in tail should engross the settlement, and conceal the fact, although at law his title would be absolute, a Court of Equity would award a perpetual injunction

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[1] Sir Thomas Clarke, (Master of the Rolls,) in one of his elaborate opinions, has remarked, in regard to uses and trusts, that, at law, the legal operation controls the intent; but, in Equity, the intent controls the legal operation of the deed. Burgess *v.* Wheate, 1 W. Black. R. 137.

[2] Kemp *v.* Pryor, 7 Ves. 219 to 251; 2 Bac. Abridg. Court of Chancery, C.

[3] Grounds and Rudim. of the Law, M. 9, p. 16, (edit. 1751); Doct. and Stud. Dial. 1, ch. 20.

against asserting it to the prejudice of the settlement.[1] So, if an heir at law should, by parol, promise his father to pay his sisters' portions, if he would not direct timber to be felled to raise them; although discharged at law, he would in Equity be deemed liable to pay them, in the same way, as if they had been charged on the land.[2] And many cases of a like nature may be put.[3]

§ 64 *a*.[4] So, in many cases, Equity acts by analogy to the rules of Law in relation to equitable titles and estates. Thus, although the Statutes of Limitations are in their terms applicable to Courts of Law only; yet Equity, by analogy, acts upon them, and refuses relief under like circumstances. Equity always discountenances laches; and holds, that laches is presumable in cases, where it is positively declared at law. Thus, in cases of equitable titles in land, Equity requires relief to be sought within the same period in which an ejectment would lie at law; and, in cases of personal claims, it also requires relief to be sought within the period prescribed for personal suits of a like nature.[5]

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[1] Raw *v.* Potts, Prec. Ch. 35; S. C. 2 Vern. R. 239.

[2] Dalton *v.* Poole, 1 Vent. R. 318.

[3] 1 Fonbl. Eq. B. 1, ch. 3, § 4; Hobbs *v.* Norton, 1 Vern. R. 135; Neville *v.* Robinson, 1 Bro Ch. C. 543; Devenish *v.* Baines, Prec. Ch. 3; Oldham *v.* Litchfield, 2 Freem. R. 284; Thynn *v.* Thynn, 1 Vern. R. 296; 11 Ves, 638, 639; Gilb. Lex Prætor. 336; Sugden, Vendors, (7th edit.) p. 717, 718; 3 Wooddes. Lect. lix. p. 479 to 482; Id. 486, 490, 491.

[4] This section, and the succeeding sections to § 65, were in the former editions misnumbered and repeated; and they are therefore now marked § 64. *a*, § 64. *b*, &c. to § 64. *k*, after which the numbers regularly proceed, as before.

[5] Blanshard on Limit. ch. 4, p. 61; Edsell *v.* Buchanan, 1 Ves. R. 83; Com. Dig. Chanc. 1; Mitford, Pl. Eq. 269 to 274; 1 Madd. Ch. Pr. 79, 80; 2 Madd. Ch. Pr. 244; Smith *v.* Clay, 3 Bro. Ch. R. 640, note; Cholmondeley *v.* Clinton, 2 Jack. & Walk. 156; post, § 529.

And yet there are cases, in which the Statutes would be a bar at law, but in which Equity would, notwithstanding, grant relief; and on the other hand, there are cases, where the Statutes would not be a bar at law, but where Equity, notwithstanding, would refuse relief.[1] But all these cases stand on special circumstances, which Courts of Equity can take notice of, when Courts of Law may be bound by the positive bar of the Statutes. And there are many other cases, where the rules of Law and Equity, on similar subjects, are not exactly coextensive, as to the recognition of rights, or the maintenance of remedy.[2] Thus, a person may be tenant by the courtesy of his wife's trust estate; but she is not entitled to dower in his trust estate.[3] So, where a power is defectively executed, Equity will often aid it; whereas, at Law the act is wholly nugatory.[4]

§ 64 *b*. Other illustrations of the same maxim may be drawn from the known analogies of legal and trust estates. In general, in Courts of Equity, the same construction and effect are given to perfect or executed trust estates, as are given by Courts of Law to legal estates. The incidents, properties, and consequences

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[1] See Pickering *v.* Lord Stamford, 2 Ves. jr. 289; Id. 582; 2 Madd. Ch. Pr. 244 to 247; Mitford, Pl. Eq. 269 to 274; Blanshard on Limit. ch. 4, p. 61, 81, 82, 83; 1 Fonbl. Eq. B, 1, ch. 4, § 27, note (*q*); Stackhouse *v.* Barnstown, 10 Ves. 466; Bond *v.* Hopkins, 1 Sch. & Lef. 413; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*g*); Cowper *v.* Cowper, 2 P. Will. 753.

[2] See Earl of Bath *v.* Sherwin, 10 Mod. R. 1, 3; S. C. 1 Bro. Parl. C. 270; Doc. and Stud. Dial. 1, ch. 20.

[3] Cruise, Dig. tit. 12, ch. 2, § 15; 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (*t*).

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note Ibid.; Id. B. 1, ch. 4, § 25, note (*h*).

of the estates are the same. The same restrictions are applied, as to creating estates, and bounding perpetuities, and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted.[1] But there are exceptions, as well known as the rule itself. Thus, executory trusts are treated as susceptible of various modifications and constructions, not applicable to executed trusts.[2] And even at law, the words in a will are or may be differently construed, when applied to personal estate, from what they are when applied to real estate. In short, it may be correctly said, that the maxim, that Equity follows the law, is a maxim liable to many exceptions; and that it cannot be generally affirmed, that, where there is no remedy at law in the given case, there is none in Equity; or, on the other hand, that Equity, in the administration of its own principles, is utterly regardless of the rules of law.[3]

§ 64 *c*. Another maxim is, that where there is equal Equity, the law must prevail.[4] And this is generally true; for, in such a case, the Defendant has an equal claim to the protection of a Court of Equity for his title, as the Plaintiff has to the assistance of the Court to assert his title; and then, the Court will not interpose on either side; for the rule there is, *In æquali jure melior*

[1] 3 Wooddes. Lect. lix. p. 479 to 482; 1 Fonbl. Eq. B. 1, ch. 3, § 1, p. 147, note (*b*); Cowper *v.* Cowper, 2 P. Will. 753.

[2] 3 Wooddes. Lect. lix. p. 480 to 482; 1 Fonbl. Eq. B. 1, ch. 3, § 1, p. 147, note (*b*).

[3] Kemp *v.* Pryor, 7 ves. 249, 250.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note; Id. ch. 5, § 3; 2 Fonbl. Eq. B. 6, ch. 3, § 3, and note (*c*); Id. B. 3, ch. 3, § 1; Mitford, Pl. Eq. 274; Jeremy, Eq. Jurisd. 285; Fitzsimmons *v.* Guestier, 7 Cranch, 2 18; Caldwell *v.* Ball, 1 T. R. 214.

est conditio possidentis.[1] And the Equity is equal between persons, who have been equally innocent, and equally diligent. It is upon this account, that a Court of Equity constantly refuses to interfere, either for relief or discovery, against a *bonâ fide* purchaser of the legal estate for a valuable consideration, with notice of the adverse title, if he chooses to avail himself of the defence at the proper time and in the proper mode.[2] And it extends its protection equally, if the purchase is originally of an equitable title without notice, and afterwards, with notice, the party obtains, or buys in a prior legal title, in order to support his equitable title.[3] This doctrine applies strictly in all cases, where the title of the Plaintiff, seeking relief, is equitable. But it yet remains a matter of some doubt, whether it is applicable to the case of a Plaintiff, seeking relief upon a legal title.[4] The purchaser, however, in all cases, must hold a legal title, or be entitled to call for it, in order to give him the full protection of his defence; for, if his title be merely equitable, then he must yield to a

[1] Mitf. Pl. Eq. [215] 274; 1 Fonbl. Eq. B. 1, ch. 4, § 25; Id. ch. 5, § 3; 1 Madd. Ch. Pr. 170, 171; Jeremy on Equity Jurisd. 283; Jerrard *v.* Saunders, 2 Ves jr. 454; 2 Fonbl. Eq. B. 3, ch. 3, § 1.

[2] See Sugden on Vendors, (7th edit.) ch. 16, p. 713, &c. § 10; Id. ch. 18, p. 757, 762, 763; Grounds and Rudim. of the Law, M. 236, (edit. 1751); Story on Eq. Pl. § 603, 604, 805, 806.

[3] See Sugden on Vendors, (7th edit.) ch. 16, p. 713, 728; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*c*); Post, § 108, 139, 154, 265, 381, 409, 434, 436; Grosvernor *v.* Allen, 9 Paige, R. 74, 76, 77.

[4] Sugden on Vendors, ch. 18, (7th edit,) p. 762, 763; Id. ch. 18, 2 vol. 309, 310, (9th edit); Jeremy Ex. Juris. 285. — It is an apparent anomaly in the general doctrine, that it should be inapplicable to a bill for relief founded on a legal title. Against such a bill, Lord Thurlow decided that a plea of a *bonâ fide* purchase, without notice, was no protection; Williams *v.* Lambe, 4 Bro. Ch. C. 254. Lord Loughborough seems to have entertained a different opinion; and the point has been contested by

legal and equitable title in the adverse party.[1] So, the purchaser must have paid his purchase-money before notice, for otherwise he will not be protected; and if he have paid a part only, he will be protected *pro tanto* only.[2]

§ 64 *d.* But, even when the title of each party is purely equitable, it does not always follow that the maxim admits of no preference of the one over the other. For, where the equities are in other respects equal, still another maxim may prevail, which is *Qui prior est in tempore, potior est in jure;* for precedency in time will, under many circumstances, give an advantage, or priority in right.[3] Hence, when the legal

some elementary writers, and supported by others. Mr. Belt, in his note to the case, 3 Bro. Ch. C. 264, insists on Lord Thurlow's doctrine being right; so do Mr. Roper, and Mr. Beames. But Mr. Sugden treats it as incorrect. See Jerrard *v.* Saunders, 2 Ves. jr. 454, 458; Sugden on Vendors, (7th ed.) 762, 763; Id. ch. 18, (9th ed.) 2 vol. 309, 310; Roper, Husband and Wife, 446, 447; Post, § 410, note (1); Id. §§ 436, 630, 631. — In Collins *v.* Archer, 1 Russ. & Mylne, 284, 292, Sir John Leach followed the case of Williams *v.* Lambe; and held, that the party was a *bonâ fide* purchaser for a valuable consideration without notice, was not available as a defence against a plaintiff, who relies upon a legal title. — On the other hand, Lord Abinger, in Payne *v.* Compton, (2 Y. & Coll. 457, 461,) held, that such a purchase was a good defence against any claim in Equity by the owner of the legal estate. See also Wood *v.* Mann, 1 Sumner, R. 504.

[1] Sugden on Vendors, (7th ed.) and Id. ch. 18 (9th ed.), 2 vol. p. 309, 310; Id. ch. 18, p. 757 to 763; Grounds and Rudim. of the Law, M. 236, (ed. 1751); Com. Dig. Chancery, 4 W. 12; Davies *v.* Austin, 1 Ves. jr. 247; Skirras *v.* Craig, 7 Cranch, R. 34; Whitfield *v.* Faussat, 1 Ves. 387; Jeremy on Equity Jurisd. 286.

[2] Wood *v.* Mann, 1 Sumner, R. 506, 578; Flagg *v.* Mann, 2 Sumner, R. 487; Post, § 1502.

[3] 1 Fonbl. Equity, B. 1, ch. 4, § 25; Fitzsimmons *v.* Guestier, 7 Cranch, 2; Berry *v.* Mutual Ins. Co. 2 John. Ch. R. 608; Beckett *v.* Cordley, 1 Brown, Ch. R. 358; Mackrett *v.* Symmons, 15 Ves. R. 354; Berry *v.* Mutual Insur. Co. 2 John. Ch. R. 608. See Post, § 421 *a.*; Minor *v.* Schenck, 3 Hill, N. Y. R. 228; Cherry *v.* Monro, 3 Barb. Ch. R. 618; Van Meter *v.* McFadden, 8 B. Monroe, 435.

estate is outstanding, equitable incumbrances must be paid according to priority of time.[1] And whenever the equities are unequal, there the preference is constantly given to the superior Equity.[2]

§ 64 *e*. Another maxim of no small extent is, that he who seeks Equity, must do Equity.[3] This maxim principally applies to the party, who is seeking relief, in the character of a Plaintiff in the Court. Thus, for instance, if a borrower of money upon usurious interest seeks to have the aid of a Court of Equity in cancelling, or procuring the instrument to be delivered up, the Court will not interfere in his favor, unless upon the terms, that he will pay the lender what is really and *bonâ fide* due to him. But if the lender comes into Equity, to assert and enforce his own claim under the instrument; there the borrower may show the invalidity of the instrument, and have a decree in his favor and a dismissal of the bill, without paying the lender any thing, for the Court will never assist a wrong doer in effectuating his wrongful and illegal purpose.[4] And the like principles will govern in other similar cases, where the transaction is not, as between the parties, grossly fraudulent, or otherwise liable to just exception.[5] Many other illustrations of the maxim, of a different nature, may readily be put. As, where a second incum-

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[1] Ibid. note (*e*). See Blake *v.* Hungerford, Prec. Ch. 158.

[2] Jeremy, Eq. Jurisd. 285, 286.

[3] Grounds and Rudim. of the Law, M. 175; Id. 179 (edit. 1751); Com. Dig. Chan. 3 F. 3; McDonald *v.* Neilson, 2 Cowp. R. 139, Farr *v.* Sheriffe, 4 Hare, R. 521; Hanson *v.* Keating, 4 Ibid. 4; Bowser *v.* Colby, 1 Ibid. 143; Secrest *v.* McKenna, 1 Strob. Eq. R. 356, 7 B. Monroe, 571.

[4] Fonbl. Eq. B. 1 ch. 1, § 3, note (*h*); Id. B, 1, ch. 2, § 13; Mason *v.* Gardiner, 4 Bro. ch. C. 445.

[5] Peacock *v.* Evans, 16 Ves. 511; Grounds and Rudim. of the Law, M. 175, 179, (edit. 1751).

brancer seeks relief against a prior incumbrancer, who has a claim to tack a subsequent security, he shall not have it before paying both securities. So, where a husband seeks to recover his wife's property, and he has made no settlement upon her, he shall not have it without making a suitable settlement. So, where an heir seeks possession of deeds in the possession of a jointress, he shall not have relief, unless upon the terms of confirming her jointure. So, where a party seeks the benefit of a purchase made for him in the name of a trustee, who has paid the purchase-money, but to whom he is indebted for other advances, he shall not be relieved but upon payment of all the money due to the Trustee.[1]

[1] Com. Dig. Chancery, 3 F. 3; Sturgis *v.* Champneys, 5 Mylne & Craig, 97, 101, 102. In this case Ld. Cottenham said: "Undoubtedly, for many purposes, this Court, acting upon the principle of following the law, deals with property coming under its cognizance from the legal estate being outstanding, according to the rights which would exist at law; but that is far from being universally true. Cholmondely *v.* Clinton, (2 Mer. 171; 2 J. & W. 1,) and the authorities upon which that decision was founded, are instances to the contrary. There are many cases in which this court will not interfere with a right which the possession of a legal title gives, although the effect be directly opposed to its own principles as administered between parties having equitable interests only, such as in case of subsequent incumbrancers, without notice, gaining a preference over a prior incumbrancer by procuring the legal estate. It may be to be regretted, that the rights of property should thus depend upon accident, and be decided upon, not according to any merits, but upon grounds purely technical. This, however, has arisen from the jurisdiction of law and equity being separate, and from the rules of equity, (better adapted than the simplicity of the common law to the complicated transactions of the present state of society,) though applied to subjects without its own exclusive jurisdiction, not having, in many cases, been extended to control matters properly subject to the jurisdiction of the courts of common law. Hence arises the extensive and beneficial rule of this Court, that he who asks for equity must do equity, that is, this Court refuses its aid to give to the plaintiff what the law would give him if the courts of common law

§ 64 *f*. Another maxim of general use is, that Equality is Equity; or, as it is sometimes expressed, Equity delighteth in Equality.[1] And this Equality, according to Bracton, constitutes Equity itself; *Æquitas est rerum convenientia, quæ paribus in causis paria jura desiderat, et omnia vere co-æquiparat, et dicitur æquitas, quasi æqualitas.*[2] This maxim is variously applied; as, for example, to cases of contribution between co-contractors, sureties, and others; to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of the land; and especially to cases of the marshalling and distribution of equitable assets.[3] For, although out of legal assets payment must be made of debts, in the course of administration, according to their dignity and priority of right; yet, as to equitable assets, all debts are generally deemed by Courts of Equity to stand *in pari jure*, and are to be paid proportionally, without reference to their dignity, or priority of right at law.[4]

had jurisdiction to enforce it, without imposing upon him conditions which the Court considers he ought to comply with, although the subject of the condition should be one which this Court would not otherwise enforce.— If, therefore, this Court refuses to assist a husband who has abandoned his wife, or the assignee of an insolvent husband who claims against both, in recovering property of the wife, without securing out of it for her a proper maintenance and support, it not only does not violate any principle, but acts in strict conformity with a rule by which it regulates its proceedings in other cases."

[1] Grounds and Rudim. of the Law, M. 91, (edit. 1751); Petit *v.* Smith, 1 P. Will. 9; Hulme *v.* Chitty, 9 Beavan's R. 437.

[2] Bracton, Lib. 1, cap. 3, § 20; Plowden, Comm. 467; Co. Litt. 24.

[3] Grounds and Rudim. of the Law, M. 91, (edit. 1751); 1 Wooddes. Lect. lvi. p. 486, 487, 488, 490; Shepherd *v.* Gurnsey, 9 Paige, R. 357.

[4] 3 Wooddes. Lect. lviii. p. 466 to 468; Shepherd *v.* Guernsey, 9 Paige, R. 357.

And, here, we have another illustration of the doctrine, that Equity does not always follow the law.[1]

§ 64 *g*. Another, and the last, maxim which it seems necessary to notice, is, that Equity looks upon that as done, which ought to have been done. The true meaning of this maxim is, that Equity will treat the subject-matter, as to collateral consequences, and incidents, in the same manner, as if the final acts, contemplated by the parties, had been executed, exactly as they ought to have been; not as the parties might have executed them.[2] But Equity will not thus consider things in favor of all persons; but only in favor of such as have a right to pray that the acts might be done.[3] And the rule itself is not, in other respects, of universal application; although Lord Hardwicke said, that it holds in every case except in dower.[4] The most common cases of the application of the rule are under agreements. All agreements are considered as performed, which are made for a valuable consideration, in favor of persons entitled to insist upon their performance. They are to be considered, as done at the time, when, according to the tenor thereof, they ought to have been performed. They are, also, deemed to have the same consequences attached to them; so that one party, or his privies,

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[1] 1 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and note; 1 Madd. Ch. Pr. 466; Martin *v.* Martin, 1 Ves. 211; 2 Black. Comm. 511, 512; Lewin *v.* Oakley, 2 Atk. 50; Newton *v.* Bennet, 1 Brown, Ch. Cas. 185; Silk *v.* Prime, 1 Bro. Ch. Cas. 138, note; Hazlewood *v.* Pope, 3 P. Will. 322; Moses *v.* Murgatroyd, 1 Johns. Ch. R. 119; Livingston *v.* Newkirk, 3 Johns. Ch. R. 319.

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 9; Francis, Maxims, M. 196 (edit. 1751); 1 W. Black. 129. See Atwood *v.* Vincent, 17 Conn. 575.

[3] Burgess *v.* Wheate, 1 W. Black. 123, 129; Crabtree *v.* Bramble, 3 Atk. 987; 1 Fonbl. Equity, B. 1, ch. 6, § 9, note (*s*).

[4] Crabtree *v.* Bramble, 3 Atk. 687.

shall not derive benefit by his laches or neglect; and the other party, for whose profit the contract was designed, or his privies, shall not suffer thereby.[1] Thus, money convenanted, or devised, to be laid out in land, is treated as real estate in Equity, and descends to the heir. And, on the other hand, where land is contracted, or devised, to be sold, the land is considered and treated as money.[2] There are exceptions to the doctrine, where other equitable considerations intervene, or where the intent of the parties leads the other way; but these demonstrate, rather than shake, the potency of the general rule.[3]

§ 64 *h*. There are, also, one or two rules, as to the extent of maintaining jurisdiction, which deserve notice in this place, as they apply to various descriptions of cases, and pervade whole branches of Equity Jurisprudence, and cannot, therefore, with propriety, be exclusively arranged under any one head.

§ 64 *i*. One rule is, that, if, originally, the jurisdiction has properly attached in Equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the Courts of law now entertaining jurisdiction in such cases, when they formerly rejected it. This has been repeatedly asserted by Courts of Equity, and constitutes, in some sort, the pole-star of portions of its jurisdiction. The reason is, that it cannot be left to Courts of Law to

[1] Grounds and Rudim. of the Law, M. 106, (edit. 1751.)

[2] 1 Fonbl. Eq. B. 1, ch. 6, § 9, note (*t*); Gilbert, Lex Prætor, 243, 244; Fletcher *v.* Ashburner, 1 Bro. Ch. C. 497; Craig *v.* Leslie, 3 Wheat. R. 563, 577; 3 Wooddes. Lect. lviii. p. 466, 468.

[3] Ibid. — The whole of this doctrine was very much considered by the Supreme Court, in the case of Craig *v.* Leslie, 3 Wheaton, R. 563, where a very elaborate opinion was delivered by Mr. Justice Washington.

enlarge, or to restrain the powers of Courts of Equity at their pleasure. The jurisdiction of Equity like that of Law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction, dependent upon external changes. Being once vested legitimately in the Court, it must remain there, until the Legislature shall abolish, or limit it; for, without some positive act, the just inference is, that the legislative pleasure is, that the jurisdiction shall remain upon its old foundations. This doctrine has been a good deal canvassed in modern times; and it has been especially the subject of commentary by some of the greatest Equity Judges who have ever adorned the Bench.[1] Lord Eldon, upon one occasion, said: "Upon what principle can it be said, [that] the ancient jurisdiction of this Court is destroyed, because Courts of Law now, very properly, perhaps, exercise that jurisdiction, which they did not exercise forty years ago? Demands have been frequently recovered in Equity, which now could be without difficulty recovered at law, &c. I cannot hold, that the jurisdiction is gone, merely because the Courts of Law have exercised an equitable jurisdiction."[2]

§ 64 *k*. Another rule respects the exercise of jurisdiction, when the title is at law, and the party comes into Equity for a discovery, and for a relief, as consequent on that discovery. In many cases it has been held, that, where a party has a just title to come into Equity for a discovery, and obtains it, the Court will go

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[1] See Atkinson *v.* Leonard, 3 Bro. Ch. R. 218; Ex parte Greenway, 6 Ves. 812; East India Company *v.* Boddam, 9 Ves. 468, 469; Bromeley *v.* Holland, 7 Ves. 19 to 21; Cooper, Eq. Pl. ch. 3, p. 126, 129. See also Biddle *v.* Moore, 3 Barr, 161.

[2] Kemp *v.* Pryor, 7 Ves. 249, 250.

on, and give him the proper relief; and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief. And it has accordingly been laid down by elementary writers of high reputation, that "The Court, having acquired cognizance of the suit for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake."[1] The ground is stated to be the propriety of preventing a multiplicity of suits;[2] a ground, of itself quite reasonable, and sufficient to justify the relief, and one, upon which Courts of Equity act, as we shall presently see, as a distinct ground of original jurisdiction.[3]

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[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Coop. Eq. Pl. Introd. p. xxxi.; Middletown Bank *v.* Russ, 3 Conn. R. 135.

[2] The passage from Fonblanque on Equity deserves to be quoted at large. "The concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for, as the mode of proceeding in Courts of Law requires the plaintiff to establish his case without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases where the principal facts to be proved by one party are confined to the knowledge of the other party. In such cases, therefore, it becomes necessary for the party wanting such evidence to resort to the extraordinary powers of a Court of Equity, which will compel the necessary discovery; and the Court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief, in most cases of fraud, account, accident, and mistake."

[3] See Jesus College *v.* Bloom, 3 Atk. 262, 263. In Pearce *v.* Creswick, 2 Hare, R, 293, Mr. Vice-Chancellor Wigram said: "The first proposition relied upon by the plaintiff in support of the Equity of his bill was this, that the case was one in which the right to discovery would carry with it the right to relief. And, undoubtedly, *dicta* are to be met with tending directly to the conclusion, that the right to discovery may entitle a plaintiff to relief also. In Adley *v.* The Whitstable Company, (17 Ves. 329,) Lord Eldon says: 'There is no mode of ascertaining what

§ 65. It is observable, that the guarded language used is, "in most cases," although it is certainly difficult to perceive any solid ground, why the jurisdiction should not extend to all cases, embraced by the general principle. But the qualification is made with reference to the bearing of some of the authorities. The learned author of the Treatise on Equity,[1] has laid down the principle in the broadest terms. "And when," (says he,) "this Court can determine the matter, it shall not be a handmaid to the other Courts; nor beget a suit to

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is due, except an account in a Court of Equity; but, it is said, the party may have discovery and then go to law. The answer to that is, that the right to the discovery carries along with it the right to relief in Equity.' In Ryle *v.* Haggie, (1 Jac. & Walk. 236,) Sir Thomas Plumer said: 'When it is admitted that a party comes here properly for the discovery, the Court is never disposed to occasion a multiplicity of suits by making him go to a Court of Law for the relief.' And in McKenzie *v.* Johnston, (4 Madd. 373,) Sir J. Leach says: 'The plaintiff can only learn from this discovery of the defendants how they have acted in the execution of their agency, and it would be most unreasonable that he should pay them for that discovery if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie.'

"Now, in a case in which I think that justice requires the Court, if possible, to find an Equity in this bill, to enable it, once for all, to decide the question between the parties, I should reluctantly deprive the plaintiff of any remedy to which the *dicta* I have referred to may entitle him. But I confess the arguments founded upon these *dicta*, appear to me to be exposed to the objection of proving far too much. They can only be reconciled with the ordinary practice of the Court, by understanding them as having been uttered with reference in each case to the subject-matter to which they were applied, and not as laying down any abstract proposition so wide as the plaintiff's argument requires. I think this part of the plaintiff's case cannot be stated more highly in his favor than this, that the necessity a party may be under (from the very nature of a given transaction) to come into Equity for discovery, is a circumstance to be regarded in deciding upon the distinct and independent question of equitable jurisdiction; further than this I have not been able to follow this branch of the plaintiff's argument."

[1] Mr. Ballow.

be ended elsewhere."[1] There are many authorities, which go to support this proposition. But there are many, also, which are irreconcilable with it, or at least which contain exceptions to it.

§ 66. Mr. Fonblanque has remarked: "There are some cases, in which, though the plaintiff might be relieved at law, a Court of Equity, having obtained jurisdiction for the purpose of discovery, will entertain the suit for the purpose of relief. But there certainly are other cases, when, though the plaintiff may be entitled to discovery he is not entitled to relief. To strike out the distinguishing principle, upon which Courts of Equity in such cases have proceeded, would be extremely useful. But, after having given considerable attention to the subject, I find myself incapable of reconciling the various decisions upon it."[2] What the learned author desired to ascertain, has been found equally embarrassing to subsequent inquirers; and there is a distressing uncertainty in this branch of Equity Jurisdiction in England.[3]

§ 67. In cases of account, there seems a distinct ground upon which the jurisdiction for discovery should incidentally carry the jurisdiction for relief. In the first place, the remedy at law, in most cases of this sort, is imperfect or inadequate. In the next place, where this objection does not occur, the discovery sought must often be obtained through the instrumentality of a master, or of some interlocutory order of the Court; in which case it would seem strange,

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[1] 2 Fonbl Eq. B. 6, ch. 3, § 6. — This is the very language of the Lord Keeper (afterwards Lord Chancellor Nottingham,) in Parker *v.* Dee, 2 Ch. Cas. 200, 201.

[2] 2 Fonbl. B. 6, ch. 3, § 6, note (*r*).

[3] Coop. Eq. Pl. ch. 3, § 3, p. 188, 189.

that the Court should grant some, and not proceed to full, relief.[1] In the next place, in cases not falling under either of these predicaments, the compelling of the production of vouchers and documents would seem to belong peculiarly to a Court of Equity, and to be a species of relief. And, in the last place, where neither of the foregoing principles applies, there is great force in the ground of suppressing multiplicity of suits, constituting, as it does, a peculiar ground for the interference of Equity.[2]

§ 68. Cases of accident and mistake furnish like reasons for extending the jurisdiction to relief where it attaches for discovery. The remedy at law is not in such cases, (as we shall presently see,) either complete or appropriate. And cases of fraud are least of all those in which the complete exercise of the jurisdiction of a Court of Equity in granting relief ought to be questioned or controlled; since, in addition to all other reasons, fraud constitutes the most ancient foundation of its power; and Equity sifts the conscience of the party, not only by requiring his own answer under oath, but by subjecting it to the severe scrutiny of comparison with other competent testimony; thus nar-

[1] 3 Black. Comm. 437; Mitf. Eq. Pl. by Jeremy, p. 119, 120, 123; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279.

[2] See Jesus College *v.* Bloom, 3 Atk. 262; S. C. Ambler, R. 54. — The full concurrency of jurisdiction of Courts of Equity for relief in all matters of account, whether there be a remedy at law or not, seems to have been largely insisted on by Lord Erskine, in The Corporation of Carlisle *v.* Wilson, (13 Ves. 278, 279.) And it was positively asserted by the Court of Errors in New York, in Ludlow *v.* Simond, (2 Caines, Cas. in Err. 38, 39, 53, 54.) In Ryle *v.* Haggie, (1 Jac. & Walk. 234,) the Master of the Rolls, said: "When it is admitted that a party comes here properly for a discovery, the Court is never disposed to occasion a multiplicity of suits, by making him go to a court of law for the relief."

rowing the chances of successful evasion, and compelling the party to do equity, as it shall appear upon a full survey of the whole transaction. Indeed, in many cases of fraud, what should be the nature and extent of the redress, whether it should be wholly legal or wholly equitable, or a mixture of both, can scarcely be decided, but upon a full hearing upon all the proceedings in the cause.

§ 69. But there are cases, if not leading authorities, which it is not easy to reconcile with the principles already stated in matters of fraud, accident, mistake, and account.[1] Some of them may have been adjudged upon their own peculiar circumstances; or they may stand upon some ground which leaves these principles untouched. Others are not susceptible of such a classification, and must either be rejected altogether, or be admitted to a considerable extent to overturn these principles.[2]

[1] 2 Fonbl. Eq. B. 6, ch. 3, § 6, note (*r*).

[2] In Parker *v.* Dee, (2 Chan. Cas. 200,) the bill was against an Executor for a *discovery* of assets and payment; and relief was decreed by Lord Nottingham. In Bishop of Winchester *v.* Knight, (1 P. Will. 406,) the bill was for a discovery and an account of ore, dug by a tenant during his life, and by his heir, against the executor and heir; and the Court maintained the suit, directing a trial at law, and after the trial granted relief. In Story *v.* Lord Windsor, (2 Atk. 630,) the bill was for an account of the profits of a colliery, upon a legal title asserted by the plaintiff; Lord Hardwicke sustained the bill for the account because (he said) this is not a title of land, but of a colliery, which is a kind of trade; and therefore an account of the profits may be taken here. (See also Jesus College *v.* Bloom, 3 Atk. 262.) The same learned Chancellor, in Sayer *v.* Pierce, (1 Ves. 232,) seems to have proceeded on the same ground, holding, that the party being out of possession of lands, generally, was not entitled to maintain a bill for an account of profits alone; but he retained the bill in that case, directing a trial at law upon the ground, that it asked to ascertain boundaries. In Lee *v.* Alston, (1 Bro. Ch. R. 194,) a bill for an account of timber, cut by a tenant for life, impeachabel

§ 70. But when we depart from matters of fraud, accident, mistake, and account, as the foundations of a suit in Equity, it is far more difficult to ascertain the boundary, where the right of a Court of Equity to entertain a bill for relief, as consequent upon the juris-

for waste, was entertained by Lord Thurlow, and relief granted. In Jesus College *v.* Bloom, (3 Atk. 262; S. C. Ambler, R. 54,) which was a bill for an account and satisfaction for waste, in cutting down timber before the assignment, against an assignee of the lessee of the plaintiffs, Lord Hardwicke said: "Upon the opening of the case, the bill seems improper, and an action of trover is the proper remedy. Where the bill is for an injunction, and waste has been already committed, the Court, to prevent a double suit, will decree an account and satisfaction for what is past." And because the bill sought an account only against the assignee for waste before the assignment, and without praying an injunction, his Lordship dismissed the bill. The same point was held in Smith *v.* Cooke, (3 Atk. R. 378, 381.) In Geast *v.* Barker, (2 Bro Ch. 61,) the bill was for a discovery of the quantity of coal and coke, sold from a mine let by plaintiff to defendant upon a reservation of one shilling for every stack of coal sold, &c., and prayed an issue to try what quantity a stack should contain, and suggested a custom of the country. The Master of the Rolls (Lord Kenyon) said, if it were now necessary either to decree account, or dismiss the bill, he would do the latter, as he was clear the remedy was at law. (S. C. cited in Harwood *v.* Oglander, 6 Ves. 225.) Why the remedy and account should not be given in Equity, is not stated; and it is difficult to see; since it is clear, that the bill was good for the discovery, and it was obtained. In Sloane *v.* Heatfield, (Bunb R. 18,) the bill was for a discovery of treasure trove, and relief; and the Court held it good for discovery; but that the plaintiff could not have relief; because he might bring trover at law. In Ryle *v.* Haggie, (1 Jac. & Walk. 234,) an opposite course was adopted upon the professed ground of avoiding a multiplicity of suits, the party having a good ground to seek a discovery, and there being a remedy at law. In The Duke of Leeds *v.* New Radnor, (2 Bro. Ch. R. 338, 519,) Lord Thurlow reversed the decree of the Master of the Rolls, denying relief, because there was a remedy at law, upon the ground, that the bill being retained for a year, the right to grant relief in Equity was thus far admitted, and it ought to give entire relief. See Mr. Fonblanque's comments on this case, in 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*g*,) p. 156. See Mr. Blunt's note to the case of Jesus College *v.* Bloom, Ambler, 54; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*g*); Ante, § 64 *k*, and note.

diction for discovery, begins, and where it ends.[1] The difficulty is increased by the recent rule adopted in the Courts of Equity in England, (of which we shall have occasion to speak more fully hereafter,) that, if the party seeks relief, as well as discovery, and he is entitled to discovery only, a general demurrer will lie to the whole bill.[2] The effect of this rule is, that a plaintiff may be compelled, in a doubtful case, to frame his bill for a discovery in the first instance, and having obtained it, he may be compelled to ask leave to amend, (which will not ordinarily be granted, unless it is clear, that the proper relief is in Equity,) and then he may try the question, whether he is entitled to relief or not.[3]

§ 71. In America, a strong disposition has been shown to follow out a convenient and uniform principle of jurisdiction, and to adhere to that, which seems formerly (as we have seen) to have received the approbation of Lord Nottingham.[4] The principle is, that where the jurisdiction once attaches for discovery, and the discovery is actually obtained, the Court will farther entertain the bill for relief, if the plaintiff prays it. This has been broadly asserted in many cases,[5] and certainly possesses the recommendation of simplicity

[1] See Ryle *v.* Haggie, 1 Jac. & Walk. 234; Pearce *v.* Creswick, 2 Hare, R. 243; Post, § 690.

[2] Ante, § 64 *k*, § 71 to 74; Story, Eq. Plead. § 312, § 545. And see Mitchell *v.* Greene, 10 Metc. 101.

[3] Post, § 690, 691; Mitford, Eq. Pl. by Jeremy, p. 183, 183, note (*n*); Cooper, Eq. Pl. ch. 1, § 3, p. 58; Id. ch. 3, § 3, p. 188; Story on Equity Pleadings, § 312, and note (1); Lousada *v.* Templer, 2 Russ. R. 564; Frietas *v.* Don Santos, 1 Y. and Jerv. 577; Severn *v.* Fletcher, 5 Sim. R. 457.

[4] Ante, § 65, note (3); Post, § 691.

[5] See Sanborn *v.* Kittredge, 18 Verm. 632.

and uniformity of application; and escapes from what seems to be the capricious and unintelligible line of demarcation, pointed out in the English authorities. Thus, it has been laid down in the Courts of New York, upon more than one occasion, as a settled rule, that, when the Court of Chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief.[1] A similar doctrine has been asserted in other States;[2] and it has been affirmed in the Supreme Court of the United States. On one occasion, it was laid down by the last-named Court, "That, if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party, against whom that claim is asserted, he may be required in a Court of Chancery to disclose those facts; and the Court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy."[3]

§ 72. This doctrine, however, though generally true, is not to be deemed of universal application.[4] To justify a Court of Equity in granting relief, as consequent upon discovery, in cases of this sort, it seems necessary, that the relief should be of such a nature as a Court of Equity may properly grant in the ordi-

[1] Armstrong *v.* Gilchrist, 2 Johns. Cas. 424; Rathbone *v.* Warren, 10 Johns. R. 587, 596; King *v.* Baldwin, 17 Johns. R. 384. See also Leroy *v.* Veeder, 1 Johns. Cas. 417; S. C. 2 Cain. Cas. in Err. 175; Hepburn *v.* Dundas, 1 Wheat. R. 197; Ludlow *v.* Simmond, 2 Cain. Err. 1, 38, 51, 52.

[2] Chichester's Executor *v.* Vass's Administrator, 1 Munf. R. 98; Isham *v.* Gilbert, 3 Connect. R. 166; Furguson *v.* Waters, 3 Bibb, 303: Middletown Bank *v.* Russ, 3 Connect. R. 139.

[3] Russell *v.* Clarke's Executors, 7 Cranch, 69. See Foster *v.* Swasey, 2 Wood. & Min. 217.

[4] Middletown Bank *v.* Russ, 3 Connect. R. 135, 140; Id. 166.

nary exercise of its authority. If, therefore, the proper relief be by an award of damages, which can alone be ascertained by a Jury, there may be a strong reason for declining the exercise of the jurisdiction,[1] since it is the appropriate function of a Court of Law to superintend such trials. And, in many other cases where a question arises, purely of matters of fact, fit to be tried by a Jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined; or, at all events, that if the bill is retained, a trial at law should be directed by the Court, and relief granted, or withheld, according to the final issue of the trial. Thus, if a bill seeks the discovery of a contract for the sale of goods and chattels, or of a wrongful conversion of goods and chattels, and the breach of the contract, or the conversion of the goods and chattels, is properly remediable in damages, to be ascertained by a Jury, the relief seems, properly to belong to a Court of Law. In like manner, questions of fraud in obtaining and executing a will of real estate, and many cases of controverted titles to real estate, dependent partly on matters of fact, and partly on matters of law, are properly triable in an ejectment, and may well be left to the common tribunals.[2] And it has accordingly been laid down in some of the American Courts, that, under such circumstances, where the verdict of a Jury is necessary to ascertain the extent of the relief, the plaintiff should be left to his action at law, after the discovery is obtained.[3]

[1] See Denny *v.* Gilman, 26 Maine, 149.

[2] Jones *v.* Jones, 3 Meriv. R. 161; Ridgeway *v.* Roberts, 4 Hare, R. 116.

[3] Lynch *v.* Sumral, 1 Marsh. Kentuck. R. 469.

§ 73. The distinction, here pointed out, furnishes a clear line for the exercise of Equity Jurisdiction in cases where relief is sought upon bills of discovery; and, if it should receive a general sanction in the American Courts, it will greatly diminish the embarrassments, which have hitherto attended many investigations of the subject. In the present state of the authorities, however, little more can be absolutely affirmed, than these propositions; first, that in bills of discovery, seeking relief, if any part of the relief sought be of an equitable nature, the Court will retain the bill for complete relief; secondly, that in matters of account, fraud, mistake, and accident, the jurisdiction for relief will, generally, but not universally, be retained and favored; and thirdly, that in cases, where the remedy at law is more appropriate than the remedy in Equity, or the verdict of a Jury is indispensable to the relief sought, the jurisdiction will either be declined, or, if retained, will be so, subject to a trial at law.

§ 74. From what has been already stated, it is manifest, that the jurisdiction, in cases of this sort, attaches in Equity solely on the ground of discovery.[1] If, therefore, the discovery is not obtained, or it is used as a mere pretence to give jurisdiction, it would be a gross abuse to entertain the suit in Equity, when the whole foundation, on which it rests, is either disproved, or it is shown to be a colorable disguise for the purpose of changing the forum of litigation. Hence, to maintain the jurisdiction for relief, as consequent on discovery, it is necessary, in the first place, to allege in the bill, that the facts are material to the plaintiff's

[1] See Shepard v. Sanford, 3 Barb. Ch. R. 127.

case, and that the discovery of them by the defendant is indispensable, as proof; for if the facts lie within the knowledge of witnesses, who may be called in a Court of Law, that furnishes a sufficient reason for a Court of Equity to refuse its aid. The bill must, therefore, allege, (and if required, the fact must be established,) that the plaintiff is unable to prove such facts by other testimony.[1] In the next place, if the answer wholly denies the matters of fact, of which discovery is sought by the bill, the latter must be dismissed; for the jurisdiction substantially fails by such a denial.[2]

[1] Gelston *v.* Hoyt, 1 Johns. Ch. R. 543; Seymour *v.* Seymour, 4 Johns. Ch. R. 409; Pryor *v.* Adams, 1 Call, R. 382; Duvalls *v.* Rose, 2 Munf. R. 290, 296; Bass *v.* Bass, 4 H. Munf 478.

[2] Russell *v.* Clarke's Executors, 7 Cranch, 69; Ferguson *v.* Waters, 3 Bibb. R. 303; Nourse *v.* Gregory, 3 Litt. R. 378; Robinson *v.* Gilbraith, 4 Bibb. R. 184.

CHAPTER IV.

CONCURRENT JURISDICTION OF EQUITY. — ACCIDENT.

§ 75. HAVING disposed of these matters, which may in some sort be deemed preliminary, the next inquiry, which will occupy our attention is, to ascertain the true boundaries of the jurisdiction at present exercised by courts of Equity. The subject here naturally divides itself into three great heads, the concurrent, the exclusive, and the auxiliary or supplemental jurisdiction.[1] As the concurrent jurisdiction is that, which is of the greatest extent, and most familiar occurrence in practice, I propose to begin with it.

§ 76. The concurrent jurisdiction of Courts of Equity may be truly said to embrace, if not all, at least a very large portion of the orignal jurisdiction, inherent in the Court from its very nature, or first conferred upon it upon the dissolution or partition of the powers of the Great Council, or *Aula Regis*, of the King. We have already seen, that it did not take its rise from the introduction of technical uses or trusts, as has sometimes been erroneously supposed.[2] Its original foundation, then, may be more fitly referred to what Lord Coke deemed the

[1] In this division I follow Mr. Fonblanque and Mr. Jeremy; and though a more philosophical division might be made, I am by no means certain that it would be more convenient. Mr. Maddock has made a different division; but, upon reflection, I have not been inclined to give it a preference. 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Jeremy on Eq. Jurisd. Introd. p. xxvii.

[2] Ante, § 42, 43; 1 Cooper's Public Records, 357.

true one — fraud, accident and confidence.[1] In many cases of this sort, Courts of Common Law are, and for a long time have been, accustomed to exercise jurisdiction, and to afford an adequate remedy. And in many other cases, in which anciently no such remedy was allowed, their jurisdiction is now expanded, so as effectually to reach them.[2] Still, however, there are many cases of fraud, accident, and confidence, which either Courts of Law do not attempt to redress at all; or, if they do, the redress which they afford, is inadequate and defective.[3] The concurrent jurisdiction, then, of Equity, has its true origin in one of two sources; either the Courts of Law, although they have general jurisdiction in the matter, cannot give adequate, specific, and perfect relief; or, under the actual circumstances of the case, they cannot give any relief at all. The former occurs in all cases, when a simple judgment for the plaintiff, or for the defendant, does not meet the full merits and exigencies of the case; but a variety of adjustments, limitations, and cross claims, are to be introduced, and finally acted on; and a decree, meeting all the circumstances of the particular case between the very parties, is indispensable to complete distributive justice. The latter occurs, when the object sought is incapable of being accomplished by the Courts of Law; as, for instance, a perpetual injunction, or a preventive process, to restrain trespasses, nuisances, or waste.[4] It may, therefore, be

[1] 4 Inst. 84; Earl of Bath *v.* Sherwin, 10 Mod. 1; 3 Black. Comm. 431.

[2] 3 Black. Comm. 431, 432.

[3] See 7 Dane's Abridg. ch. 225, art. 5, § 10; art. 6, § 1; Com. Dig. Chancery, 3 F. 8.

[4] See Jeremy on Eq. Jurisd. 292; Id. 307; 3 Wooddes. Lect. lvi. p. 397, &c.; Beames, Eq. Pl. ch. 3, p. 77, 78.

said, that the concurrent jurisdiction of Equity extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate, and complete remedy at law.[1]

§ 77. The subject, for convenience, may be divided into two branches; (1.) that, in which the subject-matter constitutes the principal (for it rarely constitutes the sole) ground of the jurisdiction; and (2.) that, in which the peculiar remedies afforded by Courts of Equity constitute the principal (although not always the sole) ground of the jurisdiction. Of these we shall endeavor to treat successively in their order, beginning with that of the subject-matter, where the relief is deemed more adequate, complete, and perfect in Equity than at Common Law; but where the remedy is not, or, at least, may not be, of a peculiar and exclusive character.[2] It is proper, however, to add, that, as the grounds of jurisdiction often run into each other, any attempt at a scientific method of distribution of the various heads would be impracticable and illusory.

§ 78. And, in the first place, let us consider the cases, where the jurisdiction arises from accident. By the term, *accident*, is here intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the result of any negligence or misconduct in the party.[3] Lord Cowper, speaking on the subject of acci-

[1] Com. Dig. Chancery, 3 F. 9.

[2] See Mitford, Pl. Eq. by Jeremy, 111; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12.

[3] Grounds and Rudim. of the Law, M. 120, p. 81, (edit. 1781.) See Jeremy on Equity Jurisd. B. 3, Pt. 2, Introd. p. 538. — Mr. Jeremy defines accident, in the sense used in a Court of Equity, to be "an occurrence in

dent, as cognizable in Equity, said: "By accident is meant, when a case is distinguished from others of the like nature by unusual circumstances;"[1] a definition quite too loose and inaccurate, without some further qualifications; for it is entirely consistent with the language, that the unusual circumstances may have resulted from the party's own gross negligence, folly, or rashness.

§ 79. The jurisdiction of the Court, arising from accident, in the general sense already suggested, is a very old head in Equity, and probably coeval with its existence.[2] But it is not every case of accident, which will justify the interposition of a Court of Equity.[3] The jurisdiction, being concurrent, will be maintained only, first, when a Court of Law cannot grant suitable relief; and, secondly, when the party has a conscientious title to relief. Both grounds must concur in the given case; for otherwise a Court of Equity not only may, but is bound to withhold its aid. Mr. Justice Blackstone has very correctly observed, that "Many accidents are supplied in a Court of Law; as loss of deeds, mistakes in receipts and accounts, wrong payments, deaths, which

relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law." Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358. Accidents, in the sense of a Court of Equity, may arise in relation to other things besides contracts, and therefore the confining of the definition to contracts is not entirely accurate. The definition is defective in another respect; for it does not exclude cases of unanticipated occurrences, resulting from the negligence or misconduct of the party seeking relief.

[1] Earl of Bath *v.* Sherwin, 10 Mod. R. 1, 3; Com. Dig. Chancery, 4 D. 10.

[2] See East India Company *v.* Boddam, 9 Ves. 466; Armitage *v.* Wadsworth, 1 Madd. R. 189 to 193.

[3] Whitfield *v.* Faussat, 1 Ves. 392, 393.

made it impossible to perform a condition literally, and a multitude of other contingencies. And many cannot be redressed, even in a Court of Equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement."[1]

§ 80. The first consideration then is, whether there is an adequate remedy at law, not merely, whether there is some remedy at law.[2] And here, a most material distinction is to be attended to. In modern times, Courts of Law frequently interfere, and grant a remedy under circumstances, in which it would certainly have been denied in earlier periods. And, sometimes, the Legislature, by express enactments, has conferred on Courts of Law the same remedial faculty, which belongs to Courts of Equity. Now, (as we have seen,) in neither case, if the Courts of Equity originally obtained and exercised jurisdiction, is that jurisdiction overturned, or impaired by this change of the authority at law in regard to legislative enactments; for, unless there are prohibitory or restrictive words used, the uniform inter-

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1 3 Black. Comm. 431; Com. Dig. Chancery, 3 F. 8. — Even this language is true in a general sense only; for, (as we shall presently see,) omissions in a family settlement, and many other defects in private and legal proceedings, may be redressed, or rather supplied, in Equity. 1 Fonbl. Eq. B. 1, ch. 1, § 7; Mitford, Pl. Eq. 127, 128, (4th edit.) by Jeremy. In Whitfield *v.* Faussat, (1 Ves. 392,) Lord Hardwicke is reported to have said: "The loss of a deed is not always a ground to come into Courts of Equity for relief; for, if there was no more in the case, although he (the plaintiff) is entitled to have a discovery of that, whether lost or not, Courts of Law [sometimes] admit evidence of the loss of a deed, proving the existence of it, and the contents, just as a Court of Equity does." The other parts of his Lordship's opinion show, that the word "sometimes" should be inserted, as a qualification of the language.

2 Cooper, Eq. Pl. 129.

pretation is, that they confer concurrent and not exclusive remedial authority.[1] And it would be still more difficult to maintain, that a Court of Law, by its own act, could oust or repeal a jurisdiction already rightfully attached in Equity.[2]

§ 81. One of the most common interpositions of Equity under this head is, in the case of lost bonds, or other instruments under seal.[3] Until a very recent period, the doctrine prevailed that there could be no remedy on a lost bond, in a Court of Common Law, because there could be no *profert* of the instrument, without which the declaration would be fatally defective.[4] At present, however, the Courts of Law do entertain the jurisdiction, and dispense with the profert, if an allegation of loss, by time and accident, is stated in the declaration.[5] But this circumstance is not per-

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[1] Case *v.* Fishback, 10 B. Monroe, 40.

[2] Mitf. Pl. Eq. 113, 114; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*,) p. 15, 16, 17; Atkinson *v.* Leonard, 3 Bro. Ch. R. 218; Ex parte Greenway, 6 Ves. 812; Bromley *v.* Holland, 7 Ves. 19, 20; East India Company *v.* Boddam, 9 Ves. 466; Walmsley *v.* Child, 1 Ves. 341; Kemp *v.* Pryor, 7 Ves. 248 to 250; Cooper, Eq. Pl. ch. 3, p. 129; Ludlow *v.* Simond, 2 Caines, Cas. in Err. 1; King *v.* Baldwin, 17 Johns. R. 384; Post *v.* Kimberly, 9 Johns. R. 470; Mayne *v.* Griswold, 3 Sanf. S. C. R. 463.

[3] Mr. Reeves, (Hist. of English Law, Vol. 3, p. 189,) has remarked, that by the old Common Law, "When a person was to found a claim by virtue of a deed, which was detained in the hands of another, so that he was prevented from making a profert of it, he was utterly deprived of the means of obtaining justice according to the forms of law. If a deed of grant of rent, common, or annuity were lost, as these claims could only be substantiated by the evidence of a deed, they vanished together with it."

[4] Whitfield *v.* Faussat, 1 Ves. 392, 393; Co. Lit. 35, (*b*); Rex. *v.* Arundel, Hob. R. 109; Atkins *v.* Leonard, 3 Bro. Ch. R. 218; Ex parte Greenway, 5 Ves. 812; Bromley *v.* Holland, 7 Ves. 19, 20; East India Company *v.* Boddam, 9 Ves. 466; Toulman *v.* Price, 5 Ves. 238.

[5] Read *v.* Brokman, 3 T. R. 151; Totty *v.* Nesbitt, 3 T. R. 153, note.

mitted, in the slightest degree, to change the course in Equity.[1]

§ 82. Independent of this general ground of the inability to make a proper profert of the deed at law, there is another satisfactory ground for the interference of a Court of Equity. It is, that no other Court can furnish the same remedy with all the fit limitations, which may be demanded for the purposes of justice, by granting *relief* only upon the terms of the party's giving (when proper) a suitable bond of indemnity. Now, a Court of Law is incompetent to require such a bond of indemnity as a part of its judgments, although it has sometimes attempted an analogous relief, (it is difficult to understand upon what ground,) by requiring the previous offer of such an indemnity.[2] But such an offer may, in many cases, fall far short of the just relief; for, in the intermediate time, there may be a great change of the circumstances of the parties to the bond of indemnity.[3] In joint bonds, there are still stronger reasons; for the equities may be different between the different defendants.[4] And, besides, a Court of Equity, before it it will grant *relief*, (it is otherwise, where *discovery* only is sought,) will insist, that the defendant shall have the protection of the oath and affidavit of the plaintiff to the fact of the loss;

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[1] Ibid. Walmsley *v.* Child. 1 Ves. 341; Kemp. *v.* Pryor, 7 Ves. 249, 250; Cooper, Eq. Pl. 129, 130; Evans *v.* Bicknell, 6 Ves. R. 182; Mayne *v.* Griswold, 3 Sanf. S. C. R. 478.

[2] Ex parte Greenway, 6 Ves. 812; Pierson *v.* Hutchinson, 2 Camp. 211; S. C. 6 Esp. 126; Fales *v.* Russell, 16 Pick. 315; Smith *v.* Rockwell, 2 Hill, (N. Y.) 482; Hansard *v.* Robinson, 7 B. & Cresw. 90.

[3] East India Company *v.* Boddam, 9 Ves. 466; Ex parte Greenway, 6 Ves. 812.

[4] Ibid.

thus requiring, what is most essential to the interests of justice, that the party should pledge his conscience by his oath, that the instrument is lost.[1]

§ 83. We have seen, that, in cases of the loss of sealed instruments, Equity will entertain a suit for relief, as well as for discovery, upon the party's making an affidavit of the loss of the instrument, and offering indemnity. The original ground of granting the relief was the supposed inadequacy of a Court of Law to afford it in a suitable manner, from the impossibility of making a profert.[2] But, where discovery only, and not relief, is the object of the bill, there, Equity will grant the discovery without any affidavit of loss, or offer of indemnity; and, in a variety of cases, this is all that the plaintiff may desire.[3] The ground of this distinction is, that, when relief is prayed, the proper forum of jurisdiction is sought to be changed from Law to Equity; and in all such cases an affidavit ought to be required to prevent abuse of the process of the Court. But when discovery only is sought, the original jurisdiction remains at Law, and Equity is merely auxiliary. The jurisdiction for discovery alone would, therefore, seem upon principle to be universal. But the jurisdiction for relief is special, and limited to peculiar cases; and in all these cases, there must be an affidavit of the

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[1] Bromley *v.* Holland, 7 Ves. 19, 20; Ex parte Greenway, 6 Ves. 812; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*,) p. 16, 17; Whitchurch *v.* Golding, 2 P. Will. 541; Anon. 3 Atk. 17; Mitf. Pl. by Jeremy, 29, 54, 123, 124; Walmsley *v.* Child, 1 Ves. 344, 345; Cooper, Eq. Pl. ch. 3, p. 126, 129, 130; Id. Introd. p. xxviii. xxix; Leroy *v.* Veeder, 1 Johns. Cas. 417.

[2] Ibid. Anon. 2 Atk. 61; Mitf. Eq. Pl. by Jeremy, 113, 114.

[3] Dormer *v.* Fortescue, 3 Atk. 132; Whitchurch *v.* Golding, 2 P. Will. 541; Walmsley *v.* Child, 1 Ves. 344, 345.

loss, and, when proper, an offer of indemnity also in the bill.[1]

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[1] In Walmsley *v.* Child, (1 Ves. R. 344,) Lord Hardwicke is reported to have said, that there are but three cases in which a bill for discovery and relief on lost instruments can be maintained in Equity. The passage, however, is singularly obscure, and of difficult interpretation; and I have not been able entirely to satisfy my mind, what Lord Hardwicke's real doctrine was, or what were the three cases, to which he alluded. Two of them are easily made out; but the perplexity is in ascertaining the third, as contradistinguished from the other two. The passage is as follows: "But there are cases, upon which you may come into Equity on a loss, though remedy may be at law; and one is clear upon a bill for discovery. But if you come into Equity, not only for discovery, but to have relief, on the foundation of loss, that changes the jurisdiction. And there are but three cases, in which you are entitled to that; in every one of which you are obliged to annex an affidavit to the bill, to prove the loss. If the deed or instrument, upon which the demand arises, is lost, and you only come for discovery, you are entitled thereto, without affidavit; but if relief is prayed beyond that discovery, to have payment of the debt, affidavit of the loss must be annexed; for that changes the jurisdiction. If the deed lost concerned the title of lands, and possession prayed to be established, such affidavit must be annexed. Another case is of a personal demand, where loss of a bond, a bill in Equity on that loss, to be paid the demand; there, a bill for discovery will not be sufficient, but it must be to be paid the money thereon; but an affidavit must be annexed. The reason of the difference between a bond and a note is, that in an action at law, a *profert in Curiam* of the bond must itself be made; otherwise *oyer* cannot be demanded by the defendant; and if *oyer* is not given, the plaintiff cannot proceed. But that is not necessary in the case of notes; no *oyer* is demanded upon them, and proving the contents being sufficient; and nothing standing in the plaintiff's way. Another case, in which you may come into this Court on a loss is, to pray satisfaction and payment of it upon terms of given security. In an action at law, the plaintiff might offer, but the defendant could not be compelled to take; but in Equity, that would be consideration, whether they were reasonable. That was the case of Teresy *v.* Gorey, as Lord Nottingham has taken the name in an authentic record I have of it; which was Easter, 28 C. 2, where a bill of exchange was drawn on the defendant, and indorsed, in the third place, to the plaintiff, by whom the bill was either lost or mislaid, as appeared by the affidavit annexed. And the bill prayed, that the defendant might be decreed to pay the plaintiff the money, as last indorsee, according to the acceptance, the plaintiff first giving security to save the defendant harmless against all former assignments; which was so decreed, but with-

§ 84. It has been remarked by Lord Hardwicke, that the loss of a deed is not always a ground to come into a Court of Equity for relief; for, if there is no more in the case, although the party may be entitled to a discovery of the original existence and validity of the deed, Courts of Law may afford just relief, since they will admit evidence of the loss and contents of a deed, just as a Court of Equity will do.[1] To enable the party, therefore, in case of a lost deed, to come into Equity for relief, he must establish, that there is no remedy at all at law, or no remedy which is adequate, and adapted to the circumstances of the case. In the first place, he may come into Equity for payment of a lost bond; for in such a case his bill need not be for a discovery only, but may also be for relief; since the jurisdiction attached, when there was no remedy at law for want of a due profert.[2] In the next place, he may come into Equity when a deed of land has been destroyed, or is concealed by the defendant; for then, as the party cannot know which alternative is correct, a Court of Equity will make a decree, (which a Court of Law cannot,) that the plain-

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out damages and costs. In a book called Finch's Reports, 301, the decree is somewhat larger, and the acceptance of the defendant was after the third indorsement, and it is in that book, though not so in the manuscript report. And, indeed, I do take it to be as in the book; and then there is no doubt of the plaintiff's right; but if that be material, it shall be inquired into. In that case, if the plaintiff could, at law, prove the contents of his bill, and the indorsement, and the loss of it, he might have brought his action at law, upon that bill, without coming into this Court. But he was apprehensive the course of trade might stand in his way at law, and therefore came into this Court upon terms, submitting it to the judgment of the Court, whether they were not reasonable."

[1] Whitfield *v.* Faussat, 1 Ves. 392, 393; Ante, § 79, note (1.)

[2] Id. Walmsley *v.* Child, 1 Ves. 344, 345; Post, § 88.

tiff shall hold and enjoy the land, until the defendant shall produce the deed, or admit its destruction.[1] So, if a deed concerning land is lost, and the party in possession prays discovery, and to be established in his possession under it, Equity will relieve; for no remedy, in such a case, lies at law.[2] And, where the plaintiff is out of possession, there are cases, in which Equity will interfere upon lost or suppressed title deeds, and decree possession to the plaintiff; but, in all such cases there must be other equities, calling for the action of the Court.[3] Indeed, the bill must always lay some ground besides the mere loss of a title deed, or other sealed instrument, to justify a prayer for relief; as, that the loss obstructs the right of the plaintiff at law, or leaves him exposed to undue perils in the future assertion of such right.[4]

§ 85. Although upon a lost bond, Equity will decree payment for the reason already stated; yet it has been said, that it will not entertain jurisdiction for relief upon a lost negotiable note, or other unsealed security, so as to decree payment upon the mere fact of loss; for no such supposed inability to recover at law exists in the case of such a note or unsealed contract, which is lost, as exists for want of a profert of a bond at law. No profert is necessary, and no *oyer* allowed at law of such a note or security;[5] and a recovery can be had

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[1] Rex *v.* Arundel, Hob. R. 108 *b*; 1 Ves. 392.

[2] Walmsley *v.* Child, 1 Ves. 434, 435. See, also, Dalton *v.* Coatsworth, 1 P. Will. 731; Dormer *v.* Fortescue, 3 Atk. 132.

[3] Dormer *v.* Fortescue, 3 Atk. 132.

[4] See 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Id. ch. 3, § 3. See Mitf. Eq. Pl. by Jeremy, 113, 114.

[5] Walmsley *v.* Child, 1 Ves. 345; Glynn *v.* Bank of England, 2 Ves. 38, 41.

at law, upon mere proof of the loss.[1] But, then, a Court of Law cannot (as we have seen) insist upon an indemnity, or at least cannot insist upon it in such a form as may operate as a perfect indemnity.[2] In such a case, therefore, a Court of Equity will entertain a bill for relief and payment, upon an offer in the bill to give a proper indemnity under the direction of the Court, and not without. And such an offer entitles the Court to require an indemnity, not strictly attainable at law, and founds a just jurisdiction.[3]

§ 86. In the cases which we have been considering, the lost note, or other security, was negotiable. And, according to the authorities, this circumstance is most material; for otherwise it would seem, that no indem-

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[1] Walmsley *v.* Child, 1 Ves. 345; Glynn *v.* Bank of England, 2 Ves. 38, 41. In Hansard *v.* Robinson, (7 B. & Cres. 90,) it was expressly decided that no action would lie by the indorsee of a bill of exchange against the acceptor, where the bill was lost and not produced at the trial, although the loss was established to have been after it became due. The ground of the decision was, that by the custom of merchants the acceptor was entitled to the possession of the bill as his voucher for the payment; and the extreme inconvenience of requiring the acceptor to prove the loss, if he should be required so to do, in a suit by another person as Holder. The Court said the proper remedy was in Equity. where an offer of indemnity might be made and enforced. See Thayer *v.* King, 15 Ohio, 242; Lazell *v.* Lazell, 12 Verm. R. 443.

[2] Ante, § 82; 2 Camp. 211; 7 B. & Cressw. 90.

[3] Walmsley *v.* Child, 1 Ves. 314, 345; Tersey *v.* Gorey, Finch. R. 301; S. C. 1 Ves. 345; Glynn *v.* Bank of England, 1 Ves. 446; 2 Ves. 38; Mossop *v.* Eadon, 16 Ves. 430, 434; Chitty on Bills, (8th edit. 1833,) p. 290; Bromley *v.* Holland, 7 Ves. 19 to 21; Davies *v.* Dodd, 4 Price, 176; S. C. 1 Wils. Exch. R. 110. [In Hopkins *v.* Adams, 20 Verm. R. 407, the position of the text for which these authorities are cited, is critically examined by Redfield, J., and said not to be supported. It was there held not necessary, to give the Court jurisdiction, that the bill should contain an offer of indemnity, unless the bill or note had been negotiated. Relief would be given upon proof of loss, and it is for the defendant to move for indemnity if it is necessary to his protection.]

nity would be necessary,[1] and consequently no relief could be had in Equity. The propriety of this exception has been somewhat doubted; for the party is entitled, upon payment of such a note or security, to have it delivered up to him, as voucher of the payment and extinguishment of it; and it may have been assigned, in Equity, to a third person.[2] And although, in such a case, the assignee would be affected by all the equities between the original parties, yet the promisor may not always, after a great length of time, be able to establish those equities by competent proof; and, at all events, he may be put to serious expense and trouble, to establish his exoneration from the charge. The jurisdiction of Courts of Equity, under such circumstances, seems perfectly within the principles on which such Courts ordinarily proceed to grant relief, not only in cases of absolute loss, but of impending or probable mischief or inconvenience. And a bond of indemnity, under such circumstances, is but a just security to the promisor against the vexation and accumulated expenses of a suit.[3]

§ 87. It is upon grounds somewhat similar, that Courts of Equity often interfere, where the party, from the long possession or exercise of a right over property, may fairly be presumed to have had a legal title to it, and yet has lost the legal evidence of it, or is now unable to produce it. Under such circumstances, Equity acts upon the presumption, arising from such

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[1] Mossop *v.* Eadon, 16 Ves. 430, 434; see Chitty on Bills, (8th edit. 1833,) p. 291, note. Hough *v.* Barton, 20 Verm. R. 454.

[2] Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Story on Promissory Notes, § 106 to 116, § 243 to 245, § 445.

[3] See Hansard *v.* Robinson, 7 B. & Cressw. 90; East India Company *v.* Boddam, 9 Ves. 468, 469; Davies *v.* Dodd, 4 Price, R. 176.

possession, as equivalent to complete proof of the legal right. Thus, where a rent has been received and paid for a long time, Equity will enforce the payment, although no deed can be produced to sustain the claim, or the precise lands, out of which it is payable, cannot, from confusion of boundaries, or other accident, be now ascertained.[1]

§ 88. In the cases of supposed lost instruments, where relief is sought, it has been seen, that, as a guard upon the preliminary exercise of jurisdiction, an affidavit of the loss of the instrument, and that it is not in the possession or power of the plaintiff, is indispensable to sustain the bill.[2] And, in order to maintain the suit, it is further indispensable, that the loss, if not admitted by the answer of the defendant, should, at the hearing of the cause, be established by competent and satisfactory proofs.[3] For the very foundation of the suit in Equity rests upon this most material fact. If, therefore, the plaintiff should fail, at the hearing, to establish the loss of the instrument,[4] or the defendant should overcome the plaintiff's proofs by countervailing testimony of its existence, the suit will be dismissed, and the plaintiff remitted

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[1] 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*g*); Steward *v.* Bridger, 2 Vern. 516; Collett *v.* Jaques, 1 Ch. Cas. 120; Cocks *v.* Foley, 1 Vern. 359; Eton College *v.* Beauchamp, 1 Cas. Ch. 121; Holder *v.* Chambury, 3 P. Will. 255; Duke of Leeds *v.* Powell, 1 Ves. 171; Duke of Bridgewater *v.* Edwards, 4 Bro. Parl. C. 139; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. C. 338, 518; Benson *v.* Baldwin, 1 Atk. 598; Cooper, Eq. Pl. 130.

[2] East India Co. *v.* Boddam, 9 Ves. 466; Cooper, Eq. Pl. 125, 126.

[3] Stokoe *v.* Robson, 3 Ves. & B. 50; Smith *v.* Bicknell, Id. note; Cookes *v.* Hellier, 1 Ves. 234, 235; Walmsley *v.* Child, 1 Ves. 314, 345; Cooper, Eq. Pl. 239; Clavering *v.* Clavering, 2 Ves. 232; East India Company *v.* Boddam, 9 Ves. 466.

[4] As to proof of loss, see Green *v.* Bailey, 15 Sim. 542.

to the legal forum.[1] [And if the bond has been destroyed or suppressed by the obligee, no relief, of course, will be given by a Court of Equity.[2]] But if the loss is sufficiently established, when it is denied by the defendant's answer, the plaintiff will be entitled to relief, although he may have other evidence, competent and sufficient to establish the existence and contents of the instrument, of which he might have availed himself in a Court of Law.[3] For if the jurisdiction once attaches by the loss of the instrument, a Court of Equity will not drive the party to the hazard of a trial at law, when the case is fit for its own interposition, and final action upon a claim to sift the conscience of the party by a discovery.

§ 89. We have thus far been considering cases of accident, founded upon lost instruments. But there are many other cases of accident, where Courts of Equity will grant both discovery and relief. One of the earliest cases, in which they were accustomed to interfere, was, where by accident a bond had not been paid at the appointed day, and it was subsequently sued; or where a part only had been paid at the day.[4] This jurisdiction was afterwards greatly enlarged in its operation, and applied to all cases, where relief is sought against the penalty of a bond, upon the ground that it is unjust for the party to avail himself of the penalty, when an offer of full indemnity is tendered.

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[1] See Jeremy on Eq. Jurisd. 359, 360, 361; Cooper, Eq. Pl. 238, 239; Mitf. Eq. Pl. by Jeremy, 222; Armitage *v.* Wadsworth, 1 Madd. R. 192 to 194; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*h*).

[2] Davies *v.* Davies, 6 Iredell, Eq. R. 418.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 17. But see Ante, § 84, p. 100, and note (3.)

[4] Cary's Rep. 1, 2; 7 Ves. 273. See also Harg. Law Tracts, p. 431, 432; Norburie on Chancery Abuses.

The same principle governs in the case of mortgages, where Courts of Equity constantly allow a redemption, although there is a forfeiture at law.[1] And it may now be stated generally, that, where an inequitable loss or injury will otherwise fall upon a party from circumstances beyond his own control, or from his own acts done in entire good faith, and in the performance of a supposed duty, without negligence, Courts of Equity will interfere to grant him relief.

§ 90. Cases, illustrative of this doctrine, may easily be put. In the course of the administration of estates, executors and administrators often pay debts and legacies upon the entire confidence, that the assets are sufficient for all purposes. It may turn out, from unexpected occurrences, or from debts and claims, made known at a subsequent time, that there is a deficiency of assets. Under such circumstances, they may be entitled to no relief at law. But in a Court of Equity, if they have acted with good faith, and with due caution, they will be clearly entitled to it, upon the ground,

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[1] Seton *v.* Slade, 7 Ves. 273, 274; 2 White & Tudor's Eq. Lead. Cas. 377; Lenon *v.* Napper, 2 Sch. & Lefr. 684, 685; Com. Dig. Chancery, 4 A. 5; Mitf. Pl. Ch. by Jeremy, 117, 130; Cooper, Eq. Pl 130, 131; 2 Fonbl. Eq. B. 3, ch. 3, § 4, and notes. — Lord Redesdale puts the relief in cases of this sort upon the ground of accident. His language is, "In many cases of accidents, as lapse of time, the Courts of Equity will also relieve against the consequences of the accident in a Court of Law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law, upon default of payment of the mortgage money at the time stipulated for payment." Mitf. Eq. Pl. by Jeremy, 130. I apprehend, that this is not the true ground; but that it turns upon the construction of the contract, being a mere security; and time not being of the essence of the contract; and the unconscionableness of insisting upon taking the land for the money. Seton *v.* Slade, 7 Ves. 273, 274; Lenon *v.* Napper, 2 Sch. & Lefr. 684, 685; Post, §§ 1313, 1314, 1316.

that, otherwise, they will be innocently subject to an unjust loss, from what the law itself deems an accident.[1] Indeed it has been said, that in England no case at law has yet decided, that an executor or administrator, once become fully responsible, by an actual receipt of a part of his testator's property, for the administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, or destruction by fire, or loss by robbery or the like, or of reasonable confidence disappointed, or of loss by any of the other various means, which afford an excuse to ordinary agents and bailees in cases of loss without any negligence on their part; and that Courts of Law are disinclined to make such a precedent.[2] If this be a true description of the actual state of the law on this subject, it would become an intolerable grievance, if Courts of Equity should not be able, under any circumstances, to interfere in favor of executors and administrators, in

[1] Edwards *v.* Freeman, 2 P. Will. 447; Johnson *v.* Johnson, 3 Bos. & Pull. 162, 169; Hawkins *v.* Day, Ambler, R. 160; Chamberlain *v.* Chamberlain, 2 Freem. 141. But see Coppin *v.* Coppin, 2 P. Will. 296, 297; Orr *v.* Kaines, 2 Ves. 194; Underwood *v.* Hatton, 5 Beavan, R. 36.

[2] Crosse *v.* Smith, 7 East, R. 246; Johnson *v.* Johnson, 3 Bos. & Pull. 162, 169. But, see Orr *v.* Kaines, 2 Ves. 194; Hawkins *v.* Day, Ambler, R. 160. — But, even at law, the payment of a simple contract debt, without notice of a specialty debt, would, in case of a deficiency of assets, protect the executor or administrator. Davis *v.* Monkhouse, Fitzgib. R. 76; Brooks *v.* Jennings, 1 Mod. R. 174; Britton *v.* Bathurst, 3 Lev. 115; Hawkins *v.* Day, Ambler, R. 160, 162.

In Brisbane *v.* Dacres, (5 Taunt. R. 143, 159,) Mr. Justice Chambre seems to have thought, that an administrator, paying money *per capita*, in misapplication of the effects of the intestate, might recover it back at law. But Lord Chief Justice Mansfield, in the same case, doubted it; and said, if he could, it would be only under the principle of *æquum et bonum*.

order to prevent such gross injustice. And, in cases of this sort, relief has accordingly been often granted by Courts of Equity, in mitigation and melioration of the hardship of the Common Law.[1] But, to found a good title to such relief, it seems indispensable, that there should have been no negligence or misconduct on the part of such executors or administrators in the payment of the assets; for, if there has been any negligence or misconduct, that, perhaps, may induce a Court of Equity to withhold its assistance.[2]

§ 91. Other cases may be easily put, in which an executor or administrator would be entitled to relief in Equity. Thus, if he should receive money, supposed to be due from a debtor to the estate; and it should turn out that the debt had been previously paid; and, before the discovery, he had paid away the money to creditors of the estate; in such a case the supposed debtor may recover back the money in Equity from the executor; and the latter may, in the same manner, recover it back from the creditors, to whom he paid it.[3] In like manner, if an executor should recover a judgment, and receive the amount, and apply it in discharge of debts, and then the judgment should be reversed, he is compellable to refund the money, and may recover it back from the creditors.[4]

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[1] Croft's Executors *v.* Lyndsey, 2 Freem. R. 1; S. C. 2 Eq. Abridg. 452; Holt *v.* Holt, 1 Cas. Ch. 190; 2 P. Will. 447; Orr *v.* Kaines, 2 Ves. R. 194; Moore *v.* Moore, 2 Ves. 600; Nelthorp *v.* Hill, 1 Cas. Ch. 135; Noel *v.* Robinson, 1 Vern. 90, 94; 2 Eq. Abridg. Ex'rs. K. p. 452. See Riddle *v.* Mandeville, 5 Cranch, 330.

[2] See Hovenden's note to 2 Freem. R. 1, (n. 3); 1 Cas. Ch. 136; 1 Fonbl. Eq. B. 1, ch. 3, § 3.

[3] Poole *v.* Ray, 1 P. Will. 355; 2 Eq. Abrid. Ex'ors. 452, pl. 5.

[4] Ibid.

§ 92. Upon analogous grounds a Court of Equity will interpose in favor of an unpaid legatee, to compel the other legatees, who have been paid their full legacies, to refund in proportion, if there was an original deficiency of assets to pay all the legacies and the executor is insolvent; but not, as it should seem, if there was no such original deficiency, and there has been a waste by the executor.[1] The reason of the distinction seems to be, that the other legatees in the first case have received more than their just proportion of the assets; but in the last case no more than their just proportion. And, therefore, there is nothing inequitable on their part in availing themselves of their superior diligence.[2] But legatees are always compellable to

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[1] Orr *v.* Kaines, 2 Ves. 194; Moore *v.* Moore, 2 Ves. 600; Anon. 1 P. Will. 495; Walcot *v.* Hall, Id. Cox's note; S. C. 1 Bro. Ch. R. 305, and Belt's notes; Noel *v.* Robinson, 1 Vern. 94, Raithby's note (1); Edwards *v.* Freeman, 2 P. Will. 447.

[2] Id. 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*); Lupton *v.* Lupton, 2 Johns. Ch. R. 614, 626. — But it seems, that the executor himself cannot, in a case of deficiency of assets, compel the legatees to refund in favor of another legatee, who is unpaid, where the executor has made a voluntary payment; but only where the payment has been compulsive. 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*); Hodges *v.* Waddington, 2 Vent. 360; Newman *v.* Barton, 2 Vern. R. 205; Orr *v.* Kaines, 2 Ves. 194. — And in cases of creditors he cannot compel legatees to refund, if he knew of the debts at the time of the payment; but only when the debts were then unknown to him. Nelthorp *v.* Hill, 1 Ch. Cas. 136; Jewon *v.* Grant, 3 Swanst. 659; Hodges *v.* Waddington, 2 Vent. 360; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*). So that the rights of the executor himself, and that of legatees and creditors, are not precisely the same in all cases of a deficiency of assets. See 2 Eq. Abridg. Legacies, B. 13, p. 554; 17 Mass. R. 384, 385. In Massachusetts, an executor, who has voluntarily paid a legatee, can, on the subsequent discovery of a deficiency of assets, recover back the money at law. And so, if he has paid some creditors in full, and there is afterwards a deficiency of assets, he may recover back from the creditors so paid, in proportion to the deficiency. Walker *v.* Hill, 17 Mass. R. 380; Walker *v.* Bradley, 3 Pick. R. 261. See Riddle *v.* Mandeville, 5 Cranch, 329, 330.

refused in favor of creditors; because the latter have a priority of right to satisfaction out of the assets.[1]

§ 93. Other illustrations of the doctrine of relief in Equity, upon the ground of accident, may be stated. Suppose a minor is bound as apprentice to a person, subject to the Bankrupt laws, and a large premium is given for the apprenticeship to the master, and he becomes bankrupt during the apprenticeship; in such a case, Equity will interfere, and apportion the premium, upon the ground of the failure of the contract from accident.[2] So, if stock of a Government is held for the benefit of A during life, and afterwards the growing payments, as well as the arrears, are to be for the benefit of B; and then a revolution should occur, by which the payments should be suspended for several years; and A should die, before the arrears are paid; there, such revolution would be treated as an accident; and the representatives of A would be entitled to the arrears, and not B, notwithstanding the language of the contract. For the arrears, supposed in the contract, could mean only such, as might ordinarily occur, and not such as should arise from extraordinary events.[3] So, if an annuity is directed by a will to be secured by public stock; and an investment is made accordingly, sufficient at the time for the purpose; but afterwards the stock is reduced by an act of Parliament, so that the stock becomes insufficient; Equity will decree the deficiency to be

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[1] Noel *v.* Robinson, 1 Vern. 90, 94; Id. 460; Newman *v.* Barton, 2 Vern. 205; Nelthorp *v.* Hill, 1 Ch. Cas. 136; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 2, § 5, note (*p*); Lupton *v.* Lupton, 2 Johns. Ch. R. 614, 626; Anon. 1 Vern. 162; Hardwick *v.* Mynd, 1 Anst. R. 112.

[2] Hale *v.* Webb, 2 Bro. Ch. R. 78, and Belt's note. See 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*); Ex parte Sandby, 1 Atk. 149; Post, § 472.

[3] Haslett *v.* Pattle, 6 Madd. R. 4.

made up against the residuary legatees, as an accident.[1]

§ 94. In the execution of mere powers, it has been said, that a Court of Equity will interpose, and grant relief on account of accident, as well as of mistake. And this seems regularly true, where, by accident, there is a defective execution of the power. But where there is a non-execution of the power by accident, there seems more reason to question the doctrine. It is true, that it was said by two Judges in a celebrated case, that, if the party appear to have intended to execute his power, and is prevented by death, Equity will interpose to effectuate his intent; for it is an impediment by the act of God.[2] But it is doubtful, whether this doctrine can be maintained, unless the party has taken some preparatory steps for the execution; so that it may be deemed a case, not of non-execution, but of defective execution.[3] And it has been said, that Equity will also relieve in cases of a defective execution of a power, where it is rendered impossible, by circumstances over which the party has no control, for him to execute it; as if he is sent abroad by the Government, and the prescribed witnesses cannot be obtained; or if the remainder-man refuses to the party a sight of the deeds,

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[1] Davies v. Wottier, 1 Sim. and Stu. R. 463; May v. Bennet, 1 Russell, R. 370.

[2] Earl of Bath & Montague's Case, 3 Ch. Cas. 69, 93; 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (k); Id. B. 1, ch. 1, § 7, note (v); Sugden on Powers, ch. 6, § 2, p. 378, (3d edit.)

[3] See 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (h), note (k); Smith v. Ashton, 1 Ch. Cas. 264; 2 Chance on Powers, ch. 23, § 3, art. 2999 to 3004; Id. § 1, art. 2817 to 2923; Sugden on Powers, ch. 6, § 2, p. 378, (3d edit.)

creating the power, so that the party cannot ascertain the proper form of executing it.[1]

§ 95. In regard to the defective execution of powers, resulting either from accident, or mistake, or both, and also in regard to agreements to execute powers, (which may generally be deemed a species of defective execution,)[2] Courts of Equity do not in all cases interfere and grant relief; but grant it only in favor of persons, in a moral sense entitled to the same, and viewed with peculiar favor, and where there are no opposing equities on the other side.[3] Without undertaking to enumerate all the qualifications of doctrine, belonging to this intricate subject, it may be stated, that Courts of Equity, in cases of defective execution of powers, will (unless there be some countervailing equity) interpose, and grant relief in favor of purchaser,[4] creditors,[5] a wife, a child, and a charity; but not in favor of the donee of the power, or a husband, or grandchildren,[6] or remote relations, or strangers generally.[7]

§ 96. But in cases of defective execution of powers, we are carefully to distinguish between powers, which are created by private parties, and those which are specially created by statute; as, for instance, powers of tenants in tail to make leases. The latter are construed

[1] 1 Fonbl. Eq. B. 1, ch. 5, § 2, note (*h*); Earl of Bath & Montague's Case, 3 Ch. Cas. 68; Gilb. Lex Pretoria, p. 305, 306.

[2] 2 Chance on Powers, ch. 23, § 1, art. 2824, 2825, 2897 to 2915.

[3] Ib. ch. 23, § 1, art. 2817 to 2932.

[4] Schenck *v.* Ellingwood, 3 Edw. Ch. R. 175.

[5] Dennison *v.* Goehring, 7 Barr. 175.

[6] Porter *v.* Turner, 3 S. & R. 108.

[7] 2 Chance on Powers, ch. 23, § 1, art. 2830 to 2858; Id. 2859 to 2863; Id. 2864 to 2873; 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*v*); Id. B. 1, ch. 4, § 25, notes (*h*), (*i*); Id. B. 1, ch. 5, § 2, and note (*b*).

with more strictness; and, whatever formalities are required by the statute, must be punctually complied with, otherwise the defect cannot be helped, or, at least, may not, perhaps, be helped in Equity; for Courts of Equity cannot dispense with the regulations prescribed by a statute; at least, where they constitute the apparent policy and object of the statute.[1]

§ 97. As to the defects, which may be remedied, they may generally be said to be any, which are not of the very essence or substance of the power. Thus, a defect by executing the power by *Will*, when it is required to be by a Deed, or other instrument, *inter vivos*, will be aided.[2] So, the want of a seal, or of witnesses, or of a signature, and defects in the limitations of the property, estate, or interest, will be aided. And, perhaps, the same rule will apply to defective executions of powers by *femes covert*. But Equity will not aid defects, which are of the very essence or substance of the power; as, for instance, if the power be executed without the consent of parties, who are required to consent to it. So, if it be required to be executed by *Will*, and it is executed by an irrevocable and absolute *Deed;* for this is apparently contrary to the settler's intention, a will being always revocable during the life of the testator; whereas, a deed would not be revocable unless expressly so stated in it.[3]

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*t*); Id. B. 1, ch. 4, § 25, note (*e*); Earl of Darlington *v.* Pultney, Cowp. R. 267. But see 2 Chance on Powers, ch. 23, § 2, art. 2985 to 2997; Post, § 169, 177, and note (3); Bright *v.* Boyd, 1 Story, R. 478.

[2] See Mills *v.* Mills, 8 Irish Eq. R. 292.

[3] 2 Chance on Powers, ch. 23, § 1, art. 2874 to 2896; Id. art. 2930; Id. 2980 to 2984. — I have contented myself with these general state-

§ 98. But a class of cases more common in their occurrence, as well as more extensive in their operation, will be found, where trusts, or powers in the nature of trusts, are required to be executed by the trustee in favor of particular persons, and they fail of being so executed by casualty or accident. In all such cases Equity will interpose, and grant suitable relief. Thus, for instance, if a testator should, by his will, devise certain estates to A, with directions, that A should, at his death, distribute the same among his children and relations as he should choose, and A should die without making such distribution, a Court of Equity would interfere, and make a suitable distribution; because it is not given to the devisee as a mere power, but as a trust and duty which he ought to fulfil; and his omission so to do by accident, or design, ought not to disappoint the objects of the bounty.[1] It would be very different if the case were of a mere naked power, and not a power coupled with a trust.[2]

§ 99. Another class of cases is, where a testator cancels a former will upon the presumption that a later will made by him is duly executed when it is not. In

ments on this confessedly involved topic, as a full investigation of all the doctrines concerning it, more properly belongs to a treatise on Powers. The learned reader will find the whole subject fully examined, and all the leading authorities brought together, in 2 Chance on Powers, ch. 23, § 1, 2, 3, art. 2818 to 3024, and Sugden on Powers, ch. 6, p. 344 to 393, (3d edit.) and Powell on Powers, p. 54, 155, 243, 280. See Post, § 173, 174. See also 1 White & Tudor, Eq. Lead. Cases, 214.

[1] See Gibbs *v.* Marsh, 2 Metc. 243, Withers *v.* Yeadon, 1 Richardson's Eq. R. 325.

[2] Harding *v.* Glynn. 1 Atk. 469, and note by Saunders; 2 White & Tudor's Eq. Lead. Cas. 685, and notes; Brown *v.* Higgs, 4 Ves. 709; 5 Ib. 495; 8 Ib. 561; 2 Chance on Powers, ch. 23, § 1.

such a case it has been decided that the former will shall be set up against the heir in a Court of Equity, and the devisee be relieved there, upon the ground of accident.[1] But this class seems more properly to belong to the head of mistake, or of a conditional presumptive revocation, where the condition has failed.[2]

§ 99 *a*. Courts of Equity will also interfere and grant relief, (as we shall presently more fully see,) where there has been by accident a confusion of the boundaries between two estates.[3] So they will also grant relief, where, by reason of such confusion of boundaries by accident, the remedy by distress for a rent charged thereon is gone.[4]

§ 99 *b*. So, where by accident or mistake, upon a transfer of a Bill of Exchange, or a promissory note, there has been an omission by the party to indorse it according to the intention of the transfer, in such a case, the party, or, in case of his death, his executor or administrator, may be compelled in Equity to make the indorsement, and if the party has since become bankrupt, or his estate is insolvent, his assignees will be compelled to make it; for the transaction amounts to an equitable assignment, and a Court of Equity will clothe it with a legal effect and title.[5]

§ 100. These may suffice, as illustrations of the general doctrine of relief in Equity in cases of accident.

[1] Onions *v.* Tyrer, 1 P. Will. 313, 345; S. C. 2 Vern. 751; Prec. Ch. 459.

[2] 1 P. Will. 345, Cox's note; Burtenshaw *v.* Gilbert, Cowp. R. 49.

[3] Mitf. Eq. Pl. by Jeremy, 117; Post, § 565, § 615 to 622.

[4] Duke of Leeds *v.* Powell, 1 Ves. 171; Post, § 622.

[5] Watkins *v.* Maule, 2 Jac. & Walk. 242; Chitty on Bills, ch. 6, p. 263, 8th edit. 1833; Bayley on Bills, ch. 5, § 2, p. 136, 137, 5th edit. 1830; Post, § 729.

They all proceed upon the same common foundation, that there is no adequate or complete remedy at law under all the circumstances; that the party has rights which ought to be protected and enforced; or that he will sustain some injury, loss, or detriment, which it would be equitable to throw upon him.

§ 101. And this leads us, naturally, to the consideration of those cases of accident, in which no relief will be granted by Courts of Equity. In the first place, in matters of positive contract and obligation, created by the party, (for it is different in obligations or duties created by law,[1]) it is no ground for the interference of Equity, that the party has been prevented from fulfilling them by accident; or, that he has been in no default; or, that he has been prevented by accident from deriving the full benefit of the contract on his own side.[2] Thus, if a lessee on a demise covenants to keep the demised estate in repair, he will be bound in Equity as well as in Law, to do so, notwithstanding any inevitable accident or necessity by which the premises are destroyed or injured; as if they are burnt by lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force. The reason is, that he might have provided for such contingencies by his contract, if he had so chosen; and the law will presume an intentional general liability, where he has made no exception.[3]

[1] Paradine *v.* Jane, Aleyn, R. 27. See also Story on Bailments, § 25, 35, 36.

[2] 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*). See Com. Dig. Chan. 3 F. 5; Barrisford *v.* Done, 1 Vern. 98.

[3] Id. Dyer, R. 33, (*a*); Chesterfield *v.* Bolton, Com. R. 627; Bullock *v.* Dommitt, 6 T. R. 650; Brecknock, &c. Canal Company *v.* Pritchard,

§ 102. And the same rule applies in like cases, where there is an express covenant, (without any proper exception,) to pay rent during the term. It must be paid, notwithstanding the premises are accidentally burnt down during the term. And this is equally true as to the rent, although the tenant has covenanted to repair, except in cases of casualties by fire, and the premises are burnt down by such casualty; for, *Expressio unius est exclusio alterius.*[1] In all cases of this sort of accidental loss by fire, the rule prevails, *Res perit domino;* and, therefore, the tenant and landlord suffer according to their proportions of interest in the property burnt; the tenant during the term, and the landlord for the residue.

§ 103. And the like doctrine applies to other cases of contract, where the parties stand equally innocent.[2] Thus, for instance, if there is a contract for a sale at a price to be fixed by an award during the life of the parties, and one of them dies before the award is made, the contract fails, and Equity will not enforce it upon the ground of accident; for the time of making the award is expressly fixed in the contract according to the pleasure of the parties; and there is no Equity to substitute a different period.[3]

6 T. R. 750; Paradine *v.* Jane, Aleyn, R. 27; Monk *v.* Cooper, 2 Str. R. 763; 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*), p. 374, &c.; Harrison *v.* Lord North, 1 Ch. Cas. 83.

[1] Monk *v.* Cooper, 2 Str. 763; S. C. 2 Lord Raymond, 1477; Balfour *v.* Weston, 1 T. Rep. 310; Fowler *v.* Bott, 6 Mass. R. 63; Doe *v.* Sandham, 1 T. R. 705, 710; Hallett *v.* Wylie, 3 Johns. R. 44; Hare *v.* Groves, 3 Anst. 687; Holtzapffell *v.* Baker, 18 Ves. 115; Pym *v.* Blackburn, 3 Ves. 34, 38; 1 Fonbl. Equity, B. 1, ch. 5, § 8, note (*g*); Cooper, Eq. Pl. 131.

[2] Com. Dig. Chancery, 3 F. 5.

[3] Blundell *v.* Brettargh, 17 Ves. 232, 240.

§ 104. So, if A should covenant with B to convey an estate for two lives in a church lease to B by a certain day, and one of the lives should afterwards drop before the day appointed for the conveyance; B would be compelled to stand by his contract, and to accept the conveyance; for neither party is in any fault; and B, by the contract, took upon himself the risk by not providing for the accident.[1] So, if an estate should be sold by A to B, for a certain sum of money and an annuity, and the agreement should be fair, Equity will not grant relief, although the party should die before the payment of any annuity.[2]

§ 105. In the next place, Courts of Equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault; for in such a case the party has no claim to come into a Court of Justice to ask to be be saved from his own culpable misconduct. And, on this account, in general, a party coming into a Court of Equity is bound to show that his title to relief is unmixed with any gross misconduct or negligence of himself or his agents.[3]

§ 105 *a*. In the next place, Courts of Equity will not interfere upon the ground of accident, where the party has not a clear vested right; but his claim rests in mere expectancy, and is a matter, not of trust, but of volition. Thus, if a testator, intending to make a

[1] White *v.* Nutt, 1 P. Will. 61.

[2] Mortimer *v.* Capper, 1 Bro. Ch. R. 156; Jackson *v.* Lever, 3 Bro. Ch. R. 605; see also 9 Ves. 246.

[3] Marine Insurance Company *v.* Hodgson, 7 Cranch, 336. See Penny *v.* Martin, 4 Johns. Ch. R. 569; 1 Fonbl. Eq. B. 1, ch. 3, § 3; Ex parte Greenway, 6 Ves. 812. See also 7 Ves. 19, 20; 9 Ves. 467, 468.

will in favor of particular persons, is prevented from doing so by accident, Equity cannot grant relief; for it is not in the power of the Court to relieve against accidents which prevent voluntary dispositions of estates;[1] and a legatee or devisee can take only by the bounty of the testator, and has no independent right, until there is a title consummated by law. The same principle applies to a mere naked power, such as a power of appointment, uncoupled with any trust; if it is unexecuted by accident or otherwise, a Court of Equity will not interfere and execute it, as the party could or might have done.[2] But if there be a trust, it will, as we have seen, be otherwise.[3]

§ 106. In the next place, no relief will be granted on account of accident, where the other party stands upon an equal Equity, and is entitled to equal protection. Upon this ground, also, Equity will not interfere to give effect to an imperfect will against an innocent heir at law; for, as heir, he is entitled to protection, whatever might have been the intent of the testator, unless his title is taken away according to the rules of law.[4]

§ 107. So, if a tenant for life, or in tail, have a power to raise money, and he raises money by mort-

[1] Whitton *v.* Russell, 1 Atk. 448; 1 Madd. Ch. Pr. 46.

[2] Brown *v.* Higgs, 8 Ves. 559, 561; Pierson *v.* Garnet, 2 Brown, Ch. R. 38, 226; Duke of Marlborough *v.* Godolphin, 2 Ves. 61, and Belt's Supplement, 277, 278; Harding *v.* Glyn, 1 Atk. 469, and Saunders's note; 2 White & Tudor's Eq. Lead. Cas. 685, and notes; Tollet *v.* Tollet, 2 P. Will. 489; 1 Fonbl. B. 1, ch. 4, § 25, note (*h*); Id. note (*k*); 1 Madd. Ch. Pr. 46.

[3] Ante, § 98.

[4] See Com. Dig. Chancery, 3 F. 6, 7, 8; 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (*k*), (*n*); Grounds and Rudim. of the Law, M. 167, p. 128, (edit. 1751.)

gage, without any reference to the power, and not in conformity to it, the mortgage will not bind the heir in tail.[1] So, if a tenant in tail conveys the estate by bargain and sale, or enters into a contract of sale, and covenants to suffer a fine and recovery, and he dies before the fine or recovery is consummated, the heir in tail, or remainder-man is not bound; for he is deemed a purchaser under the donor, and entitled to protection, as such; and a Court of Equity will not, further than a Court of Law, carry into effect against him any act of a former tenant in tail.[2]

§ 108. And, generally, against a *bonâ fide* purchaser, for a valuable consideration, without notice, a Court of Equity will not interfere on the ground of accident; for, in the view of a Court of Equity, such a purchaser has as high a claim to assistance and protection as any other person can have.[3] Principles of an analogous nature seem to have governed in many of the cases in which the want of a surrender of copyholds has been supplied by Courts of Equity.[4]

§ 109. Perhaps, upon a general survey of the grounds of equitable jurisdiction in cases of accident, it will be found that they resolve themselves into the following; that the party seeking relief has a clear right, which cannot otherwise be enforced in a suitable manner;

[1] Jenkins *v.* Kemis, 1 Cas. Ch. 103; S. C. cited 2 P. Will. 667; 1 Fonbl. Eq. B. 1, ch. 4, § 25, notes (*l*), (*n*).

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note; Id. ch. 4, § 19, and notes; Weal *v.* Lower, 1 Eq. Abridg. 266; Powell *v.* Powell, Prec. Ch. 278.

[3] Mitford, Eq. Pl. by Jeremy, 274, X.; Cooper, Eq. Pl. 281 to 285; 2 Fonbl. Eq. B. 2. ch. 6, § 2, and notes; Malden *v.* Merrill, 2 Atk. 8; Newl. on Contr. ch. 19, p. 342; Ante, § 64 *c.*; Post, §§ 154, 165, 381, 409 to 411, 416, 434, 436.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*v*).

or, that he will be subjected to an unjustifiable loss, without any blame or misconduct on his own part; or, that he has a superior equity to the party from whom he seeks the relief.[1]

1 Many of the cases on this subject will be found collected in 1 Madd. Ch. Pr. ch. 2, § 2, p. 41, &c.; Jeremy on Equity Jurid. ch. 1, p. 359, &c., and 2 Swift's Digest, ch. 6, p. 92, &c. See Baynard *v.* Norris, 5 Gill, 477.

CHAPTER V.

MISTAKE.

§ 110. We may next pass to the consideration of the Jurisdiction of the Courts of Equity, founded upon the ground of mistake. This is sometimes the result of accident, in its large sense; but, as contra-distinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence.[1] Mistakes are ordinarily divided into two sorts, mistakes in matter of law, and mistakes in matter of fact.

§ 111. And first, in regard to mistakes in matter of law. It is a well-known maxim, that ignorance of law will not furnish an excuse for any person, either for a breach, or for an omission of duty; *Ignorantia legis neminem excusat;* and this maxim is equally as much respected in Equity as in law.[2] It probably be-

[1] Mr. Jeremy defines Mistake, in the sense of a Court of Equity, to be, "that result of ignorance of law or of fact, which has misled a person to commit that, which, if he had not been in error, he would not have done." Jeremy, Eq. Jurisd. B. 3, Pt. 2, p. 358. This definition seems too narrow, and it does not comprehend cases of omission or neglect. May there not be a mistake from surprise, or imposition, as well as from ignorance of law or fact?

[2] Bilbie *v.* Lumley, 2 East, R. 469; Doct. & Stud. Dial. 1, ch. 26, p. 92; Id. Dial. 2, ch. 46, p. 303; Stevens *v.* Lynch, 12 East, 38; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*). Hunt *v.* Rousmanière's Adm'rs. 8 Wheaton, R. 174; S. C. 1 Peters, Sup. C. R. 1; S. C. 2 Mason, R. 342; 3 Mason, R. 294; Frank *v.* Frank, 1 Ch. Cas. 84. — How far money paid under a mistake of law, is, as the civil law phrases it, liable to *repetition*, that is, to a recovery back, has been a matter much discussed by civilians,

longs to some of the earliest rudiments of English jurisprudence; and is certainly so old, as to have been

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and upon which they are divided in opinion. Pothier and Heineccius maintain the negative; Vinnius and D'Aguesseau the affirmative, the latter especially in a very masterly dissertation. Sir W. D. Evans, in the Appendix to his translation of Pothier on Obligations, (Vol. 2, p. 408 to 437) has given a Translation of the Dissertations of D'Aguesseau and Vinnius; and Sir W. D. Evans has prefixed to them a view of his own reasoning in support of the same doctrine. (Id. Vol. 2, p. 369.) The text of the Roman Law seems manifestly on the other side, although the force of the text has been attempted to be explained away, or at least limited. The Digest (Lib. 22, tit. 6, l. 9, § 3, 5,) says: "Ignorantia facti, non juris, prodesse; nec stultis solere succurri, sed errantibus;" and still more explicitly the Code says, (Lib. 1, tit. 18, l. 10,) "Cum quis jus ignorans indebitatem pecuniam solverit, cessat repetitio; per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est." See also 1 Pothier, Oblig. Pt. 4, ch. 3, § 1, n. 834; 1 Evans's Pothier on Oblig. 523, 524; Pothier, Pand. Lib. 22, tit. 6; Cujacii Opera, Tom. 4, p. 502; Comm. ad Leg. vii. de Jur. et Fact. Ignor. Heinecc. ad. Pand. Lib. 22, tit. 6, § 146; 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 13 to 17. But the question is a very different one, how far a promise to pay is a binding obligation; for a party may not be bound by the latter to pay, although he may not, if he has paid the money, be entitled to recover it back. Heineccius (ubi supra) insists on this distinction, founding himself on the Roman Law. Cujaccius also insists on the same distinction. (Cujac. Opera, Tom. 4, 506, 507, edit. 1758.) D'Aguesseau denies the distinction, as not founded in reason, and insists on the same right in both cases. Sir W. D. Evans holds to the same opinion; but insists, at all events, that a mere promise to pay, under a mistake of law, is not binding. 2 Evans's Pothier on Oblig. 395, &c. There is certainly great force in his reasoning. It has, however, been rejected by the English Courts; and a promise to pay, upon a supposed liability, and in ignorance of the law, has been held to bind the party. Stevens *v.* Lynch, 12 East, R. 38; Goodman *v.* Sayers, 2 Jac. & Walk. 263; Brisbane *v.* Dacres, 5 Taunt. R. 143; East India Company *v.* Tritton, 3 B. & Cressw. 280. Mr. Chancellor Kent held a doctrine equally extensive in Shotwell *v.* Murray, 1 Johns. Ch. R. 512, 516. See also Storrs *v.* Barker, 6 Johns. Ch. R. 166; Clarke *v.* Dutcher, 9 Cowen, R. 674. In Massachusetts it has been held, that money, paid under a mistake of law, may be recovered back; and, at all events, that a promise to pay, under a mistake of law, cannot be enforced. May *v.* Coffin, 4 Mass. R. 312; Warder *v.* Tucker, 7 Mass. R. 452; Freeman *v.* Boynton, 7 Mass. R. 488. See also Haven *v.* Foster, 9 Pick. R. 112, in which there is a very learned

long laid up among its settled elements. We find it stated with great clearness and force in the Doctor and Student, where it is affirmed, that every man is bound at his peril to take knowledge what the law of the realm is, as well the law made by Statute, as the Common Law.[1] The probable ground for the maxim is that suggested by Lord Ellenborough, that otherwise there is no saying to what extent the excuse of ignorance might not be carried.[2] Indeed, one of the remarkable tendencies of the English Common Law upon all subjects of a general nature is, to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business. If, upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs.[3] The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse, than to permit a person to reclaim his property upon the mere pretence, that, at the time of parting with it, he was

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argument by counsel on each side, on the general doctrine, and the opinions of civilians, as well as the Common Law decisions, are copiously cited.

[1] Doct. & Stud. Dial. 2, ch. 46.

[2] Dilbie *v.* Lumley, 2 East, 469, 472.

[3] Lyon *v.* Richmond, 2 Johns. Ch. R. 51, 60; Shotwell *v.* Murray, 1 Johns. Ch. R. 512; Storrs *v.* Barker, 6 Johns. Ch. R. 169, 170.

ignorant of the law, acting on his title.[1] Mr. Fonblanque has accordingly laid it down as a general proposition, that in Courts of Equity ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts.[2] And he is fully borne out by authorities.[3]

§ 112. One of the most common cases, put to illustrate the doctrine, is, where two are bound by a bond, and the obligee releases one, supposing, by a mistake of law, that the other will remain bound. In such a case the obligee will not be relieved in Equity upon the mere ground of his mistake of the law;[4] for there

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[1] See Storrs *v.* Barker, 6 Johns. Ch. R. 169; Proctor *v.* Thrall, 22 Verm. 262.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*r*); 1 Madd. Ch. Pr 60. But see Moseley's Rep. 364; 1 Ves. 127; Storrs *v.* Barker, 6 Johns. Ch. R. 169, 170; Hunt *v.* Rousmaniere, 1 Peters, R. 1, 15, 16.

[3] The doctrine was pushed to a great extent (as Mr. Fonblanque has remarked) in Wibdey *v.* Cooper Company, cited in a note to East *v.* Thornbury, 3 P. Will. 127, note B, and Atwood *v.* Lamprey (ibid.), in which a tenant, who had paid a rent or annuity charged on land, without deducting the land tax, was not allowed to recover back the amount by a bill in Equity. 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*r*). There is an appearance of hardship in this doctrine; but it has been fully recognized in a late case, where an executor paid interest on a legacy without deducting the property tax. Currie *v.* Goold, 2 Madd. R. 163, and Smith *v.* Alsop, 1 Madd. R. 623. Lord Hardwicke also acted upon the same doctrine in Nicholls *v.* Leeson, 3 Atk. 573. The cases resolve themselves into an over-payment by mistake of law, or of fact; and probably of the former. But it does not appear in any of these cases, that the mistake was not mutual. It is a little difficult to reconcile these cases with the doctrine in Bingham *v.* Bingham, 1 Ves. 126, and Belt's Suppt. 79.

[4] Com. Dig. Chancery, 3 F. 8; Harmon *v.* Cannon, 4 Vin. Abridg. 387, pl. 3; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*r*). See also 1 Peters, Sup. C. R. 17; 1 P. Will. 723, 727; 2 Atk. 591; 2 Johns. Ch. R. 51; 4 Pick. R. 6, 17; Cann *v.* Cann, 1 P. Will. 723, 727. But see Ex parte Gifford, 6 Ves. 805, and the comments by Lord Denman on that case in Nicholson *v.* Revell, 6 Nev. & Mann. 192, 200; S. C. 4 Adolph. & Ellis, 675. See, also, McNaughten *v.* Partridge, 11 Ohio, R. 223; Sale *v.* Dishman, 3 Leigh, 548.

is nothing inequitable in the co-obligor's availing himself of his legal rights, nor of the other obligor's insisting upon his release, if they have both acted *bonâ fide*, and there has been no fraud or imposition on their side to procure the release.[1] So, where a party had a power of appointment, and executed it absolutely, without introducing a power of revocation, upon a mistake of law, that, being a voluntary deed, it was revocable, relief was in like manner denied.[2] If the power of revocation had been intended to be put into the appointment, and omitted by a mistake in the draft, it would have been a very different matter.

§ 113. The same principle applies to agreements entered into in good faith, but under a mistake of the law. They are generally held valid and obligatory upon the parties.[3] Thus, where a clause con-

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[1] In such a case, there is no doubt that the releasee is discharged at law. In Nicholson *v.* Revell, 6 Nev. & Mann, 200, 292, S. C. 4 Adolph. & Ellis, 675, a discharge of one party on a joint and several note was held to be a discharge of both. S. P. Cheetham *v.* Ward, 1 Bos. & Pull. 630; Hoosack *v.* Rogers, 8 Paige, R. 229.

[2] Worrall *v.* Jacob, 3 Meriv. R. 195. See, also, 1 Peters, Sup. R. 16.

[3] Pullen *v.* Ready, 1 Atk. 591; Stockley *v.* Stockley, 1 Ves. & B. 23, 30; Frank *v.* Frank, 1 Ch. Cas. 84; Mildmay *v.* Hungerford, 2 Vern. R. 213; Shotwell *v.* Murray, 1 Johns. Ch. R. 512; Lyon *v.* Richmond, 2 Johns. Ch. R. 51; Hunt *v.* Rousmaniere, 1 Peters, Sup. R. 1, 15; Storrs *v.* Barker, 6 Johns. Ch. R. 169, 170. — Some of the cases, commonly cited under this head, are cases of family agreements, to preserve family honor, or family peace; and some of them are compromises of right, thought at the time to be doubtful by all the parties. The cases of Stapilton *v.* Stapilton, 1 Atk. 10; Stockley *v.* Stockley, 1 Ves. & B. 23; Cory *v.* Cory, 1 Ves. 19; Gordon *v.* Gordon, 3 Swanst. R. 463, 467, 471, 474, 477, and perhaps Frank *v.* Frank, 1 Ch. Cas. 84, are of the former sort. And it has been said by Lord Eldon, that in family arrangements an Equity is administered in Equity, which is not applied to agreements generally. 1 Ves. & B. 30; Neale *v.* Neale, 1 Keen, 672, 683. Compromises of doubtful right stand upon a distinct ground; for in such cases the parties are equal, and it is for the public interest to

taining a power of redemption, in a deed granting an annuity, after it had been agreed to, was deliberately excluded by the parties upon a mistake of law, that it would render the contract usurious; the Court of Chancery refused to restore the clause, or to grant relief.[1] Lord Eldon, in commenting on this case, said, that it went upon an indisputable clear principle, that the parties did not mean to insert in the agreement a provision for redemption, because they were all of one mind, that it would be ruinous. And they desired the Court to do, not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation, as if they had been better informed, and consequently had a contrary intention.[2] So, where a devise was given upon condition, that a woman should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other parties, who afterwards executed an agreement respecting the estate, whereby the forfeiture was in effect waived, the Court refused any relief, although it was contended, that it was upon a mistake of law. Lord Hardwicke, on that occasion, said: "It is said, they (the parties) might know the fact, and yet not know the consequence of law. But if parties are

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suppress litigation. Cann *v.* Cann, 1 P. Will. 723; 1 Ves. & B. 30; 1 Atk. 10; Naylor *v.* Winch, 1 Sim. & Stu. 564, 565. But of these doctrines a more full discussion belongs to the text. Post, §§ 120, 121, 122, 126, 128, 129, 130, 131, 132.

[1] Irnham *v.* Child, 1 Bro. Ch. R. 92. See 6 Ves. 332, 333; 1 Peters, Sup. C. R. 16, 17; 2 White & Tudor's Eq. Lead. Cas. 530, and notes.

[2] Marquis of Townshend *v.* Strangroom, 6 Ves. 332. See also Lord Palmore *v.* Morris, 2 Bro. Ch. R. 219; Hunt *v.* Rousmaniere's Administrators, 2 Mason, R. 366, 367.

entering into an agreement, and the very will, out of which the forfeiture arose, is lying before them and their counsel, while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law as to this point; and shall not be relieved on a pretence of being surprised, with such strong circumstances attending it."[1] So, where the plaintiff was tenant for life, with remainder to his first and other sons in tail, remainder to the defendant in fee; and his wife being then *privement enseint* of a son, he was advised, that, if he bought the reversion of the defendant, and took a surrender, it would merge his estate for life, and destroy the contingent remainder in his sons, and give him a fee; and he accordingly bought the reversion, and gave security for the purchase-money; and, upon a discovery of his mistake of the law, he brought a bill to be relieved against the security, it was denied, unless upon payment of the full amount.[2]

§ 114. Another illustration may be derived from a case, most vigorously contested and critically discussed, whereupon the loan of money, for which security was to be given, the parties deliberately took, after consultation with counsel, a letter of attorney, with a power to sell the property (ships) in case of nonpayment of the money, instead of a mortgage upon the property itself, upon the mistake of law, that the security by the former instrument would, in case of death or other accident, bind the property equally as strongly as a mortgage. The debtor died, and his

[1] Pullen *v.* Ready, 2 Atk. 587, 591.
[2] Mildmay *v.* Hungerford, 2 Vern. 213.

estate being insolvent, a bill in Equity was brought by the creditor against the administrators to reform the instrument, or to give him a priority by way of lien on the property, in exclusion of the general creditors. The Court, finally, after the most deliberate examination of the case at three successive stages of the cause, denied relief, upon the ground that the agreement was for a particular security selected by the parties, and not for security generally; and that the Court were asked to substitute another security for that selected by the parties, not upon any mistake of fact, but upon a mistake of law, when such security was not within the scope of their agreement.[1]

§ 115. It is manifest that the whole controversy in this case turned upon the point, whether a Court of Equity could grant relief, where a security becomes ineffectual, not by fraud or accident, or because it is not what the parties intended it to be; but because, conforming to that intention, the parties in executing it innocently mistook the law. It was the very security the parties had deliberately selected; but, by unforeseen events, it was not as good a security as they might have selected. It would have been most extraordinary and unprecedented for a Court of Equity, under such circumstances, to grant relief; for it would be equivalent to decreeing a new agreement, not contemplated by the parties, instead of executing that actually made by them. If the party, who was to execute the power of attorney, had refused that, and

[1] Hunt *v.* Rousmaniere, 8 Wheat. R. 174; 1 Peters, Sup. C. R. 1, 13, 14; S. C. 2 Mason, R. 342; 3 Mason, R. 294. See similar instances in Greenwood *v.* Eldridge, 1 Green's Ch. R. 145; Dow *v.* Kerr, 1 Speer's Eq. R. 113 - 421; Leavitt *v.* Palmer, 3 Coms. 19.

offered a mortgage, could he have insisted on such a substitute? If a mortgage had been agreed on, could he have compelled the other side to have accepted a letter of attorney? Certainly not. Equity may compel parties to execute their agreements; but it has no authority to make agreements for them, or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed on, that would have formed a very different case; for where an instrument is drawn and executed, which professes, or is intended to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or to law, does not fulfil that intention, or violates it, Equity will correct the mistake, so as to produce a conformity to the instrument.[1]

§ 116. In a preceding section[2] it has been stated, that agreements made and acts done under a mistake of law are (if not otherwise objectionable) generally held valid and obligatory. The doctrine is laid down in this guarded and qualified manner, because it is not to be disguised, that there are authorities, which are supposed to contradict it, or at least to form exceptions to it. Indeed, in one case, Lord King is reported to have said, that the maxim of law, *Ignorantia juris non excusat*, was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes; but that it did not hold in civil cases.[3] This broad statement is

[1] See the able opinion of Mr. Justice Washington in Hunt *v.* Rousmaniere's Adm'rs. 1 Peters, Sup. C. R. 13–17. See Heacock *v.* Fly, 14 Penn. St. R. 511.

[2] *Ante*, § 113.

[3] Lansdowne *v.* Lansdowne, Mosely, R. 364; S. C. 2 Jac. & Walk. 205. *Contra*, McAninch *v.* Laughlin, 13 Penn. St. R. 371.

utterly irreconcilable with the well-established doctrine both of Courts of Law and Courts of Equity. The general rule certainly is, (as has been very clearly stated by the Supreme Court of the United States,) that a mistake of the law is not a ground for reforming a deed, founded on such a mistake. And whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision.[1]

§ 117. In illustration of this remark, we may refer to a case, commonly cited as an exception to the general rule. In that case, the daughter of a freeman of London had a legacy of £10,000, left by her father's will, upon condition that she should release her orphanage share; and, after her father's death, she accepted the legacy, and executed the release. Upon a bill, afterwards filed by her against her brother, who was the executor, the release was set aside, and she was restored to her orphanage share, which amounted to £40,000. Lord Chancellor Talbot, in making the decree, admitted, that there was no fraud in her brother, who had told her that she was entitled to

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[1] Hunt *v.* Rousmaniere, 1 Peters, Sup. C. R. 15; S. C. 8 Wheaton, R. 211, 212. See also Hepburn *v.* Dunlap, 10 Wheaton, R. 179, 195; Shotwell *v.* Murray, 1 Johns. Ch. R. 512, 515; Lyon *v.* Richmond, 2 Johns. Ch. R. 51, 60; Storrs *v.* Barker, 6 Johns. Ch. R. 169, 170. — Mr. Chancellor Kent has laid down the doctrine in equally strong terms. "It is rarely," says he, "that a mistake in point of law, with a full knowledge of all the facts, can afford ground for relief, or be considered as a sufficient indemnity against the injurious consequences of deception practised upon mankind, &c. It would therefore seem to be a wise principle of policy, that ignorance of the law, with a knowledge of the facts, cannot generally be set up as a defence." Storrs *v.* Barker, 6 Johns. Ch. R. 169, 170. See Emmet *v.* Dewhirst, 8 Eng. Law and Eq. R. 83.

her election to take an account of her father's personal estate, and to claim her orphanage share; but she chose to accept the legacy. His Lordship said: "It is true, it appears, the son (the defendant) did inform the daughter, that she was bound either to waive the legacy given by the father, or release her right to the custom. And, so far, she might know that it was in her power to accept either the legacy or orphanage part. But I hardly think she knew she was entitled to have an account taken of the personal estate of her father; and first to know, what her orphanage part did amount to; and that when she should be fully apprised of this, then, and not till then, she was to make her election; which very much alters the case. For, probably, she would not have elected to accept her legacy, had she known, or been informed, what her orphanage part amounted unto, before she waived it and accepted the legacy." [1]

§ 118. It is apparent, from this language, that the decision of his Lordship rested upon mixed considerations, and not exclusively upon mere mistake or ignorance of the law by the daughter. There was no fraud in her brother; but it is clear, that she relied upon her brother for knowledge of her rights and duties in point of law; and he, however innocently, omitted to state some most material legal considerations, affecting her rights and duty. She acted under this misplaced confidence, and was misled by it; which of itself constituted no inconsiderable ground for relief. But a far more weighty reason is, that she acted under ignorance of facts; for she neither knew, nor

[1] Pusey v. Desbouvrie, 3 P. Will. 315, 321; 2 Ball & Beat. 182. See Pickering v. Pickering, 2 Beavan, R. 31, 56.

had any means of knowing, what her orphanage share was, when she made her election. It was, therefore, a clear case of surprise in matters of fact, as well as of law. No ultimate decision was made in the case, it being compromised by the parties.[1]

§ 119. The case of Evans *v.* Llewellyn[2], is expressly put in the decree upon the ground of surprise, "the conveyance having been obtained and executed by the plaintiffs improvidently." It was admitted, that there was no sufficient proof of fraud or imposition practised upon the plaintiff, (though the facts might well lead to some doubt on that point); and the plaintiff was certainly not ignorant of any of the facts, which respected his rights. The Master of the Rolls (Sir Lloyd Kenyon, afterwards Lord Kenyon) said: "The party was taken by surprise. He had sufficient time to act with caution; and therefore, though there was no actual fraud, it is something like fraud; for an undue advantage was taken of his situation. I am of opinion, that the party was not competent to protect himself; and therefore this Court is bound to afford him such protection; and therefore these deeds ought to be set aside, as *improvidently* obtained. If the plaintiff had, in fact, gone back, I should have rescinded the transaction."[3]

§ 120. The most general class of cases relied on as exceptions to the rule, is that class where the party has acted under a misconception, or ignorance of his title to the property, respecting which some agreement has been made, or conveyance executed. So

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[1] See Heacock *v.* Fly, 14 Penn. St. R. 541.

[2] 2 Bro. Ch. R. 150; 1 Cox, R. 333, more full.

[3] 1 Cox, R. 340, 341.

far as ignorance in point of fact of any title in the party is an ingredient in any of these cases, they fall under a very different consideration."[1] But so far as the party, knowing all the facts, has acted upon a mistake of the law, applicable to his title, they are proper to be discussed in this place. Upon a close survey, many, although not all, of the cases, in the latter predicament, will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which Equity uniformly regards as a just foundation for relief.[2]

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[1] See Ramsden *v.* Hylton, 2 Ves. 304; Cann *v.* Cann, 1 P. Will. 727; Farewell *v.* Coker, cited 2 Meriv. 269; McCarthy *v.* Decaix, 2 Russ. & Mylne, 614. In this case Lord Chancellor Brougham held, that where a husband renounced his title to his wife's property, from whom he had been divorced, under a mistake in point of law, that the divorce was valid, and he had no longer any title to her property, and under a mistake of fact as to the amount of the property renounced, the information respecting which the other party knew and withheld from him, he was entitled to relief. But the relief seems to have been granted upon mixed considerations. His Lordship, in one part of his opinion, said: "What he (the husband) has done was in ignorance of law, possibly of fact; but in a case of this kind, that would be one and the same thing." See also Corking *v.* Pratt, 1 Ves. 400.

[2] See Willan *v.* Willan, 16 Ves. 82. — Mr. Jeremy (Eq. Jurisd P. 2, ch. 2, p. 366) seems to suppose that there is something technical in the meaning of the word *surprise* as used in Courts of Equity; for, speaking upon what, he says, is technically called a case of surprise, he adds, "which [surprise] it seems is a term for the immediate result of a certain species of mistake, upon which this Court will relieve," a definition or description not very intelligible, and rather tending to obscure than to clear up the subject. In another place (ch. 3, p. 383, note) he says, that surprise is often used as synonymous with fraud; but that "they may, perhaps, be distinguished by the circumstance, that in instances to

§ 121. It has been laid down, as unquestionable doctrine, that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a Court of Equity will relieve him from the effect of his mistake.[1] But,

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which the term *fraud* is applied, an unjust design is presupposed; but that in those to which surprise is assigned, no fraudulent intention is to be presumed. In the former case one of the parties seeks to injure the other: in the latter both of them act under an actual misconception of the law." Whether this explanation makes the matter much clearer, may be doubted. The truth is, that there does not seem any thing technical or peculiar in the word, *surprise*, as used in Courts of Equity. The common definition of Johnson sufficiently explains its sense. He defines it to be the act of taking unawares; the state of being taken unawares; sudden confusion or perplexity. When a Court of Equity relieves on the ground of surprise, it does so upon the ground that the party has been taken unawares, that he has acted without due deliberation, and under confused and sudden impressions. The case of Evans *v.* Llewellyn, 2 Bro. Ch. R. 150, is a direct authority to this very view of the matter. There may be cases, where the word *surprise* is used in a more lax sense, and where it is deemed presumptive of, or approaching to, fraud. (1 Fonbl. Eq. B. 1, ch. 2, § 8, p. 125; Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 71, 103, 114.) But it will always be found, that the true use of it is, where something has been done, which was unexpected, and operated to mislead or confuse the parties on the sudden, and on that account has been deemed a fraud. See Earl of Bath and Montague's Case, 3 Ch. Ca. 56, 74, 114; Irnham *v.* Child, 1 Bro. Ch. 92; Marquis of Townshend *v.* Stangroom, 6 Ves. 327, 338; Twining *v.* Morrice, 2 Bro Ch. R. 326; Willan *v.* Willan, 16 Ves. 81, 86, 87. In Evans *v.* Llewellyn, 1 Cox, R. 310, the Master of the Rolls, adverting to the cases of surprise where an undue advantage is taken of the party's situation, said: "The cases of infants dealing with guardians, of sons with fathers, all proceed upon the same general principles, and establish this, that if the party is in a situation, in which he is not a free agent, and is not equal to protecting himself, this Court will protect him. See 1 Fonbl. Eq. B. 1, ch. 2, § 8. See Post, § 234, 235, and note (1,) § 236, 237, 238, 239, 240, 242.

[1] Naylor *v.* Winch, 1 Sim. & Stu. 555. See also 1 Ves. 126; Moseley, R. 364; 2 Jac. & Walk. 205; Leonard *v.* Leonard, 2 B. & Beatt. 180; Dunnage *v.* White, 1 Swanst. 137. See Hunt *v.* Rousmaniere,

where a doubtful question arises, such as a question respecting the true construction of a will, a different rule prevails; and a compromise fairly entered into, with due deliberation, will be upheld in a Court of Equity, as reasonable in itself, to terminate the differences by dividing the stake, and as supported by principles of public policy.[1]

§ 122. In regard to the first proposition, the terms in which it is expressed have the material qualification, that the party has, upon plain and settled principles of law, a clear title, and yet is in gross ignorance that he possesses any title whatsoever. Thus, in England, if the eldest son, who is heir at law of all the undisposed of fee simple estates of his ancestor, should, in gross ignorance of the law, knowing, however, that he was the eldest son, agree to divide the estates with a younger brother; such an agreement, executed or unexecuted, would be held, in a Court of Equity, invalid, and relief would be accordingly granted. In a case thus strongly put, there may be ingredients, which would give a coloring to the case, independent of the mere ignorance of the law. If the younger son were not equally ignorant, there would be much ground to suspect fraud, imposition, misrepresentation, or undue influence on his part.[2] And if he were

8 Wheaton, R. 211 to 215; S. C. 1 Peters, Sup. C. R. 1, 15, 16: Gudon v. Gudon, 3 Swanst. 400. — In the very case in which the doctrine is laid down in such general terms, relief was denied, because the claim was doubtful, and the compromise was after due deliberation. Naylor v. Winch, 1 Sim. & Stu. 555. Is there any distinction between ignorance of a principle of law, and mistake of a principle of law, as to this point? See 1 Madd. Ch. Pr. 61.

[1] Ibid.; Pickering v. Pickering, 2 Beavan, R. 31, 56.

[2] Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 366; Leonard v. Leonard, 2 B. & Beatt. 182.

equally ignorant, the case would exhibit such a gross mistake of rights, as would lead to the conclusion of such great mental imbecility, or surprise, or blind and credulous confidence, on the part of the eldest son, and might fairly entitle him to the protection of a Court of Equity upon general principles.[1] Indeed, where the party acts upon the misapprehension, that he has no title at all in the property, it seems to involve in some measure a mistake of fact, that is, of the fact of ownership, arising from a mistake of law. A party can hardly be said to intend to part with a right or title, of whose existence he is wholly ignorant; and if he does not so intend, a Court of Equity will, in ordinary cases, relieve him from the legal effect of instruments, which surrender such unsuspected right or title.[2]

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[1] See Hunt *v.* Rousmaniere, 8 Wheat. R. 211, 212, 214; S. C. 1 Peters, Sup. C. R. 15, 16; S. C. 2 Mason, R. 342; 3 Mason, R. 294. See Ayliffe's Pand. B. 2, tit. 15, p. 116.

[2] See Ramsden *v.* Hylton, 2 Ves. 304; 2 Meriv. R. 269. — I am aware that, generally, where the facts are known, the mistake of the title of heirship is treated as a mistake of law. Indeed, in the civil law it is put as the most prominent illustration of the distinction between ignorance of fact and ignorance of law. Si quis nesciat se cognatum esse, interdum in jure, interdum in facto, errat. Nam si et liberum se esse, et ex quibus natus sit, sciat, jura autem cognationis habere se nesciat in jure errat. At si quis forte expositus, quorum parentam esset, ignoret, fortasse et serviat alicui, putans se servum esse; in facto, magis quam in jure errat. Dig. Lib. 22, tit. 6, l. 1, § 2; Pothier, Pand. Lib. 22, tit. 6, § 1, n. 1; 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 4. Is ownership or heirship a conclusion of law, or of fact, or a mixed result of both? Is title to an estate a fact, or not? Is ignorance of the title, when all the facts on which it legally depends, are known, ignorance of a fact, or of law? Mr. Powell puts the case of Lansdowne *v.* Lansdowne, (Moseley, R. 364) as a case of misrepresentation of a fact, that is, that the party was not heir, when in fact he was heir. See 2 Powell on Contracts, 196. An error of law, in relation to heirship, is not, in the civil law, always fatal to the party. It will not deprive him of a right resulting from his heir-

§ 123. One of the earliest cases on this subject is Turner *v.* Turner, (in 31 Car. 2,)[1] where the plaintiff's father had lent a sum on mortgage to A, who mortgaged lands to the father and his heirs, with a proviso, that, on payment of the money to the father, or his *heirs*, the premises were to be reconveyed to A. The plaintiff was executor of his father, and claimed the mortgage, as vesting in the executor, and not in the heirs. The defendant was the son and heir at law of the plaintiff's eldest brother, and set up a release of this mortgage, and an allotment of it to him, upon an agreement made among the heirs for a division of the personal estate, and a subsequent receipt of the mortgage by him. The plaintiff insisted, that, at the time of the release, he looked on the mortgage as belonging to the defendant, as heir at law, and knew not his own title thereto; and that the mortgage was worth £8,000, and the shares on the division only £250 a piece. The Lord Chancellor (Lord Nottingham) relieved the plaintiff, stating that the plaintiff had an undoubted right to the mortgaged premises. This case is reported, without any statement of the grounds of the decision, so that it is impossible now to ascertain them. There may have been surprise, or imposition, or undue influence; or the defendant might have well known the plaintiff's rights, and suppressed his own knowledge of them. If it proceeded upon the

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ship; as, if a nephew accounts with an uncle for the whole effects of a deceased brother, upon the mistake of law that the uncle was sole heir, he shall be restored to his rights. 1 Domat, Civil Law, B. 1, tit. 18, § 1, n. 15. The rule of the Civil Law is, Juris ignorantia non prodest adquirere volentibus; suum vero petentibus non nocet. Dig. Lib. 22, tit. 6, l. 7.

[1] 2 Rep. in Ch. 81. [151.]

naked ground of a mistake of law, it is not easily reconcilable with other cases. But, if it proceeded upon the ground that the plaintiff had no knowledge of his title to the mortgage, and therefore did not intend to release any title to it, the release might well be relieved against, as going beyond the intentions of the parties, upon a mutual mistake of the law. It might, then, be deemed, in some sort, a mistake of fact, as well as of law. It was certainly a plain mistake of the settled law; and, if both parties acted under a mutual misconception of their actual rights, they could not justly be said to have intended what they did. Mutual misapprehension of rights, as well as of the effect of agreements, may properly furnish, in some cases, a ground for relief.[1]

§ 124. In Bingham *v.* Bingham,[2] there was a devise by A to his eldest son and heir B, in fee tail, limiting the reversion to his own right heirs. B left no issue, and devised the estate to the plaintiff. The defendant had brought an ejectment for the estate under the will; and the plaintiff purchased the estate of the defendant for £80, under a mistake of law, that the devise to him, by B, could not convey the fee. Having paid the purchase-money, he now brought his bill to have it refunded, alleging in the bill, that he was ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer, that B had no power to make the devise. The Master of the Rolls, sitting for Lord Hardwicke, granted the relief, saying, that, though no fraud appeared, and the de-

[1] Willan *v.* Willan, 16 Ves. 81, 82, 85.

[2] 1 Ves. 126; Belt's Sup. 79. See Leonard *v.* Leonard, 2 B. & Beatt. 183.

fendant apprehended he had a right, yet there was a plain mistake, such as the Court was warranted to relieve against. It is certainly not very easy to reconcile this case with the general doctrine already stated. It is admitted by the report, that the defendant supposed he had a right; and, indeed, it was probably a case of a family compromise upon a doubted, if not a doubtful right, and a mutual claim, and a mutual ignorance of the law. If so, it trenches upon that class of cases, and is inconsistent with them. If, on the other hand, the defendant's title was adverse, and not a family controversy; still, if the agreement was fairly entered into by the contending parties, it is difficult to perceive why it should have been set aside, merely because in the event the title turned out to be in the plaintiff.[1] There were, probably, some circumstances in the case material to a decision, which have not reached us; otherwise, it would conflict with other cases already cited.[2]

[1] See Leonard v. Leonard, 2 B. & Beatt. 171, 180, 182.

[2] Mr. Belt, in his Supplement, (p. 79,) has given a more full account of the facts of the case, from the Register's Book, which I have followed. As a family compromise, or a compromise with a stranger, claiming an adverse right under a mutual mistake, but in good faith, it is difficult to find any support for it in other authorities. See Stockley v. Stockley, 1 V. & B. 23; Cory v. Cory, 1 Ves. 19; Gordon v. Gordon, 3 Swanston, R. 463, 467, 471, 474, 477; Cann v. Cann, 1 P. Will. 723; 1 Ves. & B. 30; Naylor v. Winch, 1 Sim. & Stu. 564, 565; Leonard v. Leonard, 2 B. & Beatt. 171, 180, 182. The case of Corking v. Pratt, 1 Ves. 400, and Belt's Supplement, 176, seems to have turned upon a mistake, not of law, but of fact. But, then, it does not appear, that, at the time, either party knew what the personal estate would ultimately amount to, and it might have been a matter of great doubt, and a compromise accordingly made. If so, could it be afterwards set aside? (See Burt v. Barlow, 3 Bro. Ch. R. 451; Leonard v. Leonard, 2 B. & Beatt. 171, 180.) If the case turned upon the ground of a suppression of facts, known to the mother, and not to the daughter, or upon

§ 125. The case of Lansdowne *v.* Lansdowne[1] was to the following effect. The plaintiff, who was heir at law, and son of the eldest brother, had a controversy with his uncle, (who was the youngest brother,) whether he or his uncle was heir to the estate of another deceased brother of his uncle; and they consulted one Hughes, who was a schoolmaster and their neighbor, and he gave it as his opinion, upon examining the Clerk's Remembrancer, that the uncle had the right, because lands could not ascend; upon which the plaintiff and his uncle agreed to divide the lands between them, and in pursuance of this agreement they executed, first a bond, and then conveyances of the shares fixed on for each. The plaintiff sought to be relieved against these instruments, alleging in his bill that he had been surprised and imposed upon by Hughes and his uncle. The uncle being dead, his son and Hughes were made defendants to the bill; and Hughes, in his answer, admitted, that he had

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undue influence or imposition, there could be little difficulty in supporting it. The case of Ramsden *v.* Hylton, (2 Ves. 304; Belt's Supplement, 350,) turned upon other considerations. How can the case of Bingham *v.* Bingham, as a case standing upon general principles, be reconciled with Muldmay *v.* Hungerford, (2 Vern. 213,) and Pullen *v.* Ready, (2 Atk. 587, 591)? Lord Cottenham, in Stewart *v.* Stewart, 6 Clark & Finell. R. 968, said: "Bingham *v.* Bingham was not a case of compromise, but of a sale, by the defendant to the plaintiff, of an estate which was already his; and a return of the purchase-money was decreed at the Rolls, upon the ground of mistake. That case, therefore, does not bear directly upon the present. If it were necessary to consider the principle of that decree, it might not be easy to distinguish that case from any other purchase, in which the vendor turns out to have had no title. In both there is a mistake, and the effect of it in both is, that the vendor receives, and the purchaser pays money without the intended equivalent." See also Evans *v.* Llewellyn, 2 Bro. Ch. R. 150.

[1] Moseley, R. 361; S. C. 2 Jac. & Walk. 205.

given the opinion, being misled by the book, and that he had recommended the parties to take further advice; but that the plaintiff had afterwards told him, that, if his uncle would, he would agree to share the land between them, let it be whose right it would, and thereby prevent all disputes and lawsuits. Upon which Hughes prepared the papers, and they were executed accordingly. Lord Chancellor King decreed, that it appeared, that the bond and conveyances "were obtained by mistake, and misrepresentation of the law," and ordered them to be given up to be cancelled. It is upon this occasion that his Lordship is reported to have used the language already quoted, that the maxim, that ignorance of the law was no excuse, did not apply to civil cases; but if his judgment proceeded upon that ground, it was (as has been already stated) manifestly erroneous. This case has been questioned on several occasions, and is certainly open to much criticism. It appears to have been a case of a family dispute and compromise, made by parties equally innocent, and upon a doubted question of title under a mutual mistake of the law. Under such circumstances, there is great difficulty in sustaining it in point of principle or authority. It was most probably decided by Lord King on the untenable ground already suggested. If, indeed, it proceeded upon the ground of undue confidence in Hughes's opinion, or was induced by his undue persuasions and influence, such a misrepresentation of the law by him might, under such circumstances, furnish a reason for relief.[1] But that does not appear in any report of the case.[2]

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[1] See Fitzgerald *v.* Peck, 4 Littell, 127.

[2] The case of Lansdowne *v.* Lansdowne has been doubted on several

§ 126. The distinction between cases of mistake of a plain and settled principle of law, and cases of

occasions. The report in 2 Jac. & Walk. 205, is more full than that in Moseley, though to the same effect. The decree was, that the agreement "was obtained by a mistake and misrepresentation of the law," which, under certain circumstances, might furnish a ground for relief. The case was closely criticised and doubted by the Supreme Court of the United States, in Hunt *v.* Rousmaniere, 8 Wheaton, R. 214, 215, and 1 Peters, Sup. C. R. 15, 16. The Court seemed to think it might be explicable, upon the ground that the plaintiff was ignorant of the fact, that he was the eldest son; or if he mistook his legal rights, that he was imposed upon by some unfair representations of his better informed opponent; or, that his ignorance of the law of primogeniture demonstrated such mental imbecility as would entitle him to relief. There is an apparent error in the suggestion of the Supreme Court, that there was an award in the case. Hughes did not act as an arbitrator, but was merely consulted as a friend. If there had been a plain mistake of the law by an arbitrator, that would, of itself, in many cases, have been a ground of relief. Corneforth *v.* Geer, 2 Vern. 705; Ridout *v.* Pain, 3 Atk. 491. Mr. Powell (on Contracts, vol. 2, p. 196) puts the case of Lansdowne *v.* Lansdowne as an illustration of a mistake of a fact, that is, of heirship. In Stewart *v.* Stewart, 6 Clark & Finnell. R. 966, Lord Cottenham made the following remarks: "Lansdowne *v.* Lansdowne is a very strong case of setting aside a compromise, and a conveyance in pursuance of it; but it is impossible to ascertain the facts. It appears that fraud was alleged against the younger brother; and Hughes, who had advised upon the rights of the two, was made a defendant, which could only have been done upon an imputation of fraud, and in Moseley's Report it is said, that the Lord Chancellor's decree proceeded upon the ground of mistake and misrepresentation. But Mr. Jacob's extract from the Registrar's book is no doubt correct in stating the ground to be 'misrepresentation of the law.' It is, however, to be observed, that in Moseley the eldest son is reported to have said, that he would rather divide the estate than go to law, though he had the right; and that the Court is represented to have said, that the maxim ignorantia juris non excusat did not hold in civil cases, which, it will be seen, has not been a doctrine recognized in modern cases:" He afterwards added: "Bilbie *v.* Lumley is directly opposed to the doctrine upon which Lansdowne *v.* Lansdowne is stated in Moseley to have been decided; for it was held, that 'money paid by one with full knowledge (or the means of such knowledge in his hands) of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law.'" Stewart *v.* Stewart, 6 Clark & Finnell. 969.

mistake of a principle of law, not plain to persons generally, but which is yet constructively certain, as a foundation of title, is not of itself very intelligible, or practically speaking, very easy of application, considered as an independent element of decision. In contemplation of law, all its rules and principles are deemed certain, although they have not, as yet, been recognized by public adjudications. This doctrine proceeds upon the theoretical ground, that *Id certum est, quod certum reddi potest;* and that decisions do not make the law, but only promulgate it. Besides; what are to be deemed plain and settled principles? Are they such as have been long and uniformly established by adjudications only? Or is a single decision sufficient? What degree of clearness constitutes the line of demarkation? If there have been decisions different ways at different times, which is to prevail."[1] If a majority of the profession hold one doctrine, and a minority another, is the rule to be deemed doubtful, or is it to be deemed certain?

§ 127. Take the case commonly put on this head, of the construction of a will. Every person is presumed to know the law; and though opinions may differ upon the construction of the will before an adju-

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[1] There is much masculine force in the reasoning of Mr. Chancellor Kent, on this subject, in Lyon *v.* Richmond, 2 Johns. Ch. R. 60. "The Court (says he) do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of the law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle, which is safe and practicable in the common intercourse of mankind. And to suffer a subsequent judicial decision, in any one given case on a point of law, to open or annul every thing that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences."

dication is made; yet, when it is made, it is supposed always to have been certain. It may have been a question at the bar, whether a devise was an estate for life, or in tail, or in fee simple. But when the Court has once decided it to be the one or the other, the title is always supposed to have been fixed and certain in the party from the beginning. It will furnish a sufficient title to maintain a bill for the specific performance of a contract of sale of that title.

§ 128. Where there is a plain and established doctrine on the subject, so generally known, and of such constant occurrence, as to be understood by the community at large as a rule of property, such as the common canons of descent; there, a mistake in ignorance of the law, and of title founded on it, may well give rise to a presumption, that there has been some undue influence, imposition, mental imbecility, surprise, or confidence abused. But in such cases the mistake of the law is not the foundation of the relief; but it is the medium of proof to establish some other proper ground of relief.

§ 129. Lord Eldon, in a case of a family agreement, seems to have thought, that there might be a distinction between cases, where there is a doubt raised between the parties as to their rights, and a compromise is made upon the footing of that doubt, and cases, where the parties act upon a supposition of right in one of the parties, without a doubt upon it, under a mistake of law. The former might be held obligatory, when the latter ought not to be.[1] But his lordship admitted that the doctrine attributed to Lord

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[1] Stockley *v.* Stockley, 1 V. & Beames, 31.

Macclesfield was otherwise, denying the distinction, and giving equal validity to agreements entered into upon a supposition of a right, and of a doubtful right.[1] It may be gathered, however, from these remarks, that Lord Eldon's own opinion was, that an agreement made or act done, not upon a doubt of title, but upon ignorance of any title in the party, ought not to be obligatory upon him, although arising solely from a mistake of law.

§ 130. There may be a solid ground for a distinction between cases, where a party acts or agrees in ignorance of any title in him, or upon the supposition of a clear title in another, and cases where there is a doubt

[1] Ibid. Cann *v.* Cann, 1 P. Will. 727; Stapilton *v.* Stapilton, 1 Atk. 10. — Lord Eldon was here speaking in the case of a family agreement, and not between strangers; but it is by no means certain, that he meant to limit his observations to such cases. In Dunnage *v.* White, 1 Swanst. R. 137, 151, Sir Thomas Plumer said: "It is, then, insisted, that the deed may be supported as a family arrangement, according to the doctrine of Stapilton *v.* Stapilton, and Cann *v.* Cann. Undoubtedly, parties, entitled in different events, may, while the uncertainty exists, each, taking his chance, effect a valid compromise. In Stapilton *v.* Stapilton, the legitimacy of the eldest son was doubtful. That was a question proper to be so settled; and the settlement was a consideration, which gave effect to the deed." In Stewart *v.* Stewart, 6 Clark & Finnell. R. 967, Lord Cottenham used the following language. "In Stapilton *v.* Stapilton, Henry, the eldest son, being illegitimate, Philip, the second son, received no consideration for the arrangement by which the estates of which Philip was tenant in tail, subject to his father's life, were divided between them; but Lord Hardwicke, approving the doctrine of Lord Macclesfield in Cann *v.* Cann, said, 'that an agreement entered into upon a supposition of a right or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of parties; for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation for an agreement;' and he therefore maintained the arrangement, and decreed a performance of what remained to be done to carry it into effect." See also Bellamy *v.* Sabine, 2 Phillips's Ch. R. 425; Hotchkin *v.* Dickson, 2 Bligh, 348.

or controversy or litigation between parties as to their respective rights.[1] In the former cases, (as has been already suggested,) the party seems to labor in some sort under a mistake of fact, as well as of law.[2] He supposes, as a matter of fact, that he has no title, and that the other party has a title to the property. He does not intend to release or surrender his title, but the act or agreement proceeds upon the supposition that he has none. Lord Macclesfield, in the very case

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[1] In Evans *v.* Llewellyn, (2 Bro. Ch. R. 150; S. C. 1 Cox, R. 333,) the Master of the Rolls (Lord Kenyon) did not seem to recognize any such distinction. The decree in that case seems to have been put upon the mere ground of surprise. But from Mr. Cox's Report, it would seem that the party was not ignorant of the facts, or even of the law of his title. Mr. Brown represents the case a little differently. In Lang *v.* The Bank of the United States, Mr. Chief Justice Shippen, speaking of the effect of a mistake of right of a party, and that he was not barred by it, said: "The case of Penn *v.* Lord Baltimore is decisive to this point. I was present at the argument half a century ago, and heard Lord Hardwicke say, though it is not mentioned in the Report, that, if Lord Baltimore had made the agreement in question, under a mistake of his right to another degree of latitude, he ought to be relieved; but that he was not mistaken." The cases of Ramsden *v.* Hylton, 2 Ves. 304, and Farewell *v.* Coker, cited 2 Meriv. R. 269, were upon mistakes of fact, not of law; or rather attempts were there made to extend the releases to property never intended by the parties. In Neale *v.* Neale, 1 Keen, R. 672, 683, A and B having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, A, the elder brother, taking the larger share, a doubt being entertained whether their father had a right to devise the lands. A was, in fact, at the time of the agreement, tenant in tail under the limitation, under a surrender made by his grandfather. After A's death, B, having discovered his own title as tenant in tail, repudiated the agreement, and brought an ejectment to recover the whole estate. On a bill, filed by the devisee of A, the court, upon the ground on which it supports family arrangements, supported the partition, and decreed B to do all necessary acts to bar the entail.

[2] Ante, § 129. And see 2 Powell on Contracts, p. 196; Dunnage *v.* White, 1 Swanst. 137, 151; Harvey *v.* Cooke, 4 Russell, R. 34.

in which the language already cited,[1] is attributed to him, is reported to have said, that if the party releasing is ignorant of his right to the estate, or if his right is concealed from him by the person to whom the release is made, there would be good reasons for setting aside the release.[2] But (he added) the mere fact that the party making the release had the right, and was controverting it with the other party, can furnish no ground to set aside the release; for, by the same reason, there could be no such thing as compromising a suit, nor room for any accommodation. Every release supposes the party making it to have a right.[3]

§ 131. The whole doctrine of the validity of compromises of doubtful rights rests on this foundation.[4] If such compromises are otherwise unobjectionable, they will be binding, and the right will not prevail against the agreement of the parties; for the right must always be on one side or the other, and there would be an end of compromises, if they might be overthrown upon any subsequent ascertainment of

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1 Ante, § 122.

2 Cann *v.* Cann, 1 P. Will. 727; Ramsden *v.* Hylton, 2 Ves. 304.

3 1 P. Will. 727. — In Leonard *v.* Leonard, (2 B. & Beatt. 180,) Lord Manners takes notice of a distinction between a mere release and a deed of compromise. The former supposes that the parties know their rights, and that one surrenders his rights to the other; in the latter, that both parties are ignorant of their rights, and the agreement is founded in that ignorance, and that the party surrendering may in truth have nothing to surrender. But is it true, in all cases, that a release presupposes a right? Lord Redesdale has said, that the accepting of a release is in no case an acknowledgment that a right existed in the releasor. It amounts only to this: I give you so much for not seeking to disturb me. Underwood *v.* Lord Courtown, 2 Sch. & Lefr. 67.

4 See the dictum of Lord Hardwicke, in Brown *v.* Pring, 1 Ves. 407, 408, as to compromises made by parties, with their eyes open, and rightly informed.

rights contrary thereto.[1] If, therefore, a compromise of doubtful right is fairly made between parties, its validity cannot depend upon any future adjudication of that right.[2] And where compromises of this sort are fairly entered into, whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result.[3] But if the parties are not mutually ignorant, the case admits of a very different consideration, whether the ignorance be of a matter of fact or of law.[4] It has been emphatically said, that

[1] Cann *v.* Cann, 1 P. Will. 727; Stapilton *v.* Stapilton, 1 Atk. 10; Stockley *v.* Stockley, 1 V. & B. 29, 31; Naylor *v.* Winch, 1 Sim. & Stu. 555; Goodman *v.* Sayers, 2 Jac. & Walk. 263; Pickering *v.* Pickering, 2 Beavan, R. 31, 56.

[2] Leonard *v.* Leonard, 2 Ball & Beatt. 179, 180; Shotwell *v.* Murray, 1 Johns. Ch. R. 516; Lyon *v.* Lyon, 2 Johns. Ch. R. 51; Dunnage *v.* White, 1 Swanst. 151, 152; Harvey *v.* Cooke, 4 Russell, 34; Stewart *v.* Stewart, 6 Clark & Finnell. 969.

[3] Leonard *v.* Leonard, 2 Ball & Beatt. 179, 180. See Gordon *v.* Gordon, 3 Swanst. 470; Pickering *v.* Pickering, 2 Beavan, R. 31, 56; Gossmour *v.* Pigge, The (English) Jurist, June 22d, 1844, p. 526.

[4] Id. 180, 182; Gordon *v.* Gordon, 3 Swanst. R. 400, 467, 470, 473, 476; Stewart *v.* Stewart, 6 Clark & Finnell. 969. See, also, a case cited by Lord Thurlow, in Mortimor *v.* Capper, 1 Bro. Ch. R. 158. — In respect to compromises, it is often laid down that they must be reasonable. (Stapilton *v.* Stapilton, 1 Atk. 10.) By this we are not to understand that the consideration is adequate, and there is no great inequality; but that the circumstances are such as to demonstrate that no undue advantage was taken by either party of the other. Thus, in a case of compromise of doubtful rights under a will, the Master of the Rolls (Sir R. P. Arden) said: "It (the agreement) must be reasonable. No man can doubt that this Court will never hold parties acting upon their rights, doubts arising as to those rights, to be bound, unless they act with a full knowledge of all the doubts and difficulties that arise. But if parties will, with full knowledge of them, act upon them, though it turns out that one gains a great advantage, if the agreement was fair and reasonable at the time, it shall be binding. There was a case before the Lord Chancellor, who spoke to me upon it, in which it was held that the Court

no man can doubt that the Court of Chancery will never hold parties, acting upon their rights, to be bound, unless they act with full knowledge of all the doubts and difficulties that do arise. But if parties will, with full knowledge, act upon them, though it turns out that one gains an advantage from a mistake in point of law, yet if the agreement was reasonable and fair at the time, it shall be binding.[1] And transactions are not, in the eye of a Court of Equity, to be treated as binding even as family arrangements, where the doubts existing, as to the rights alleged to be compromised, are not presented to the mind of the party interested.[2]

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will enforce such an agreement, though it turns out that the parties were mistaken in point of law, *even supposing counsel's opinion was wrong*. Gibbons *v.* Caunt, 4 Ves. 849. See Stapilton *v.* Stapilton, 2 Atk. 10; Naylor *v.* Winch, 1 Sim. & Stu. 555; Neale *v.* Neale, 1 Keen, R. 672, 683; Stewart *v.* Stewart, 6 Clark & Finnell. 969.

[1] Gibbons *v.* Caunt, 4 Ves. R. 849. See also Dunnage *v.* White, 1 Swanst. R. 137. See Stewart *v.* Stewart, 6 Clark & Finnell. 969; Pickering *v.* Pickering, 2 Beavan, R. 31, 56. In this case Lord Langdale said: "When parties, whose rights are questionable, have equal knowledge of facts and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective claims among themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time; and that, notwithstanding the subsequent discovery of some common error; and if in this case the parties had been on equal terms, the agreement might have been supported. But the parties were not on equal terms; and moreover, I am of opinion that, under the circumstances, it was the duty of the defendant to see that the nature of the transaction was fully explained to his mother, and to see that she was placed in a situation to have the question properly considered on her behalf; and whatever may have been his intention in this respect (for I do not think it necessary to impute to him an intentional fraud throughout the transaction), I am of opinion that he did not perform this duty; and on the whole it appears to me, that he is not entitled to the benefit of the settled account, and that the agreement must be set aside."

[2] Henley *v.* Cooke, 4 Russell, R. 34.

§ 132. There are cases of family compromises, where, upon principles of policy, for the honor or peace of families, the doctrine sustaining compromises has been carried further. And it has been truly remarked, that in such family arrangements the Court of Chancery has administered an Equity, which is not applied to agreements generally.[1] [But to render even such compromises binding, it was said in a late case, that there must be an honest disclosure, by each party to the other, of all such material facts known to him, relative to the rights and title of either, as are calculated to influence the judgment in the adoption of the compromise; and any advantage taken by either party of the other's known ignorance of such facts, will render the same void in Equity and liable to be set aside.[2]]. Such compromises, fairly and reasonably made, to save the honor of a family, as in case of suspected illegitimacy, to prevent family disputes, and family forfeitures, are upheld with a strong hand; and are binding, when in cases between mere strangers the like agreements would not be enforced.[3] Thus, it has

[1] Stockley *v.* Stockley, 1 V. & Beames, 29; Bellamy *v.* Sabine, 2 Phillips's Ch. R. 425.

[2] Smith *v.* Pincombe, 10 Eng. Law & Eq. R. 50. And see Groves *v.* Perkins, 6 Sim. 576.

[3] Stapilton *v.* Stapilton, 1 Atk. 210; Cann *v.* Cann, 1 P. Will. 727; Stockley *v.* Stockley, 1 V. & Beames, 30, 31; Persse *v.* Persse, 1 West, R. in House of Lords, 110; Cory *v.* Cory, 1 Ves. 19; Heap *v.* Tonge, 7 Eng. Law & Eq. R. 189; Leonard *v.* Leonard, 2 B. & Beatt. 171, 180; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Gordon *v.* Gordon, 3 Swanst. 463, 470, 473, 476; Dunnage *v.* White, 1 Swanst. 137, 151; Harvey *v.* Cooke, 4 Russell, R. 34. Jodwell *v.* Jodvell, 9 Beavan, R. 45; Frank *v.* Frank, (1 Ch. Cas. 84,) is generally supposed to have been decided upon this head. But it was apparently a case of misrepresentation; and Lord Manners has doubted its authority. Leonard *v.* Leonard, 2 B. & Beatt. R. 182, 183. Cory *v.* Cory, 1 Ves. 19, is very difficult to maintain; for the party was drunk at the time of the agreement.

been said, that if, on the death of a person, seised in fee, a dispute arises, who is heir; and there is room for a rational doubt, as to that fact, and the parties deal with each other openly and fairly, investigating the subject for themselves, and each communicating to the other all that he knows, and is informed of, and at length they agree to distribute the property, under the notion that the elder claimant is illegitimate, although it turns out afterwards that he is legitimate; there, the Court will not disturb such an arrangement, merely because the fact of legitimacy is subsequently established.[1] Yet, in such a case, the party acts under a mistake of fact. In cases of ignorance of title, upon a plain mistake of the law, there seems little room to distinguish between family compromises and others.

§ 132 *a*. Thus, where a father being heir presumptive to A B, who was then supposed to be a lunatic, and being under an apprehension that unfair means might be resorted to, in the then state of mind of A B, to deprive the family of the succession to the estate, agreed with his eldest son that the son should sue out a commission of lunacy against A B, and carry on such other suits and law proceedings as should be necessary, in the name of the father, at the expense of the son; in consideration of which agreement, and natural love and affection, the father covenanted that after the death of A B, the estates, which should thereupon descend to him, should be conveyed to himself for life, remainder to his son for life, with remainder to his first and other sons in tail male. The son, at his own expense, and in the name of his father, sued out the commission, under which A B was

[1] Gordon *v.* Gordon, 3 Swanst. R. 476; Id. 463.

found a lunatic, who soon afterwards died; whereupon the father succeeded as heir to the lunatic's estate. Upon a bill filed by the son to carry into effect this agreement, a specific performance was decreed; and it was held, that the agreement was not voluntary, void for champerty or maintenance, or illegal, either for want or mutuality, or as being a fraud upon the great seal in lunacy; and considering the ages and situations of the parties, the father being sixty-two and the lunatic forty, and the objects to be gained by the prosecution of the commission of lunacy, that the consideration for the deed was not inadequate; but that deeds for carrying into effect family arrangements are exempt from the rules, which affect other deeds, the consideration being composed partly of value and partly of love and affection.[1]

§ 133. And where there is a mixture of mistake of title, gross personal ignorance, liability to imposition, habitual intoxication, and want of professional advice, there has been manifested a strong disinclination of Courts of Equity to sustain even family settlements. It was upon this sort of mixed ground that it was held, in a recent case, that a deed executed by the members of a family to determine their interests under the will and partial intestacy of an ancestor, ought not to be enforced. It appeared on the face of the deed, that the parties did not understand their rights, or the nature of the transaction; and that the heir surrendered an unimpeachable title without consideration. Evidence was also given of his gross ignorance, habitual intoxication, and want of profes-

[1] Persse *v.* Persse, 1 West, Rep. in H. of Lords, p. 110; S. C. 7 Clark & Finnell. R. 279.

sional advice. But there was no sufficient proof of fraud or undue influence; and there had been an acquiescence of five years.[1]

§ 134. Cases of surprise, mixed up with a mistake of law, stand upon a ground peculiar to themselves, and independent of the general doctrine. In such cases, the agreements or acts are unadvised, and improvident, and without due deliberation; and, therefore, they are held invalid, upon the common principle adopted by Courts of Equity, to protect those who are unable to protect themselves, and of whom an undue advantage is taken.[2] Where the surprise is mutual, there is of course a still stronger ground to interfere; for neither party has intended what has been done. They have misunderstood the effect of their own agreements or acts; or have pre-supposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist. Contracts made in mutual error, under circumstances material to their character and consequences, seem, upon general principles invalid.[3] *Non videntur, qui errant, consentire,* is a rule of the civil law;[4] and it is founded in common sense and common justice. But in its application it is material to distinguish between error in circumstances which do not influence the contract, and error in circumstances which induce the contract.[5]

[1] Dunnage *v.* White, 1 Swanst. R. 137.

[2] See Evans *v.* Llewellyn, 1 Cox, R. 333; S. C. 2 Bro. Ch. 150; Marquis of Townshend *v.* Stangroom, 6 Ves. 333, 338; Chesterfield *v.* Janssen, 2 Ves. 155, 156; Ormond *v.* Hutchinson, 13 Ves. 51.

[3] Willan *v.* Willan, 16 Ves. 72, 81; Cowes *v.* Higginson, 1 Ves. & Beames, 524, 527; Ramsden *v.* Hylton, 2 Ves. 304; Farewell *v.* Coker, 2 Meriv. R. 269.

[4] Dig. Lib. 50, tit. 17, l. 116, § 2.

[5] 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*t*); Id. note (*x*). — Mr. Fonblanque has remarked, that the effect of error in contracts is very well

§ 135. There are also cases of peculiar trust, and confidence, and relation, between the parties, which give rise to a qualification of the general doctrine. Thus, where a mortgagor had mortgaged an estate to a mortgagee, who was his attorney, and in settling an account with the latter, he had allowed him a poundage for having received the rents of the estate, in ignorance of the law, that a mortgagee was not entitled to such an allowance, which was professionally known to the attorney; it was held that the allowance should be set aside. But the Master of the Rolls, upon that occasion, put the case upon the peculiar relation between the parties; and the duty of the attorney to have made known the law to his client, the mortgagor. He said that he did not enter into the distinction between allowances in accounts from ignorance of law, and allowances from ignorance of fact; that he did not mean to say that ignorance of law will generally open an account. But that, the parties standing in this relation to each other, he would not hold the mortgagor, acting in ignorance of his rights, to have given a binding assent.[1]

§ 136. There are, also, some other cases in which relief has been granted in Equity, apparently upon the ground of mistake of law. But they will be found, upon examination, rather to be cases of defective execution of the intent of the parties from ignorance of law, as to the proper mode of framing the instrument. Thus, where a husband, upon his marriage, entered into

treated by Pothier, in his Treatise on Obligations, Pt. 1, ch. 1, art. 3, § 1, 16. See also 1 Domat, Civil Law, B. 1, tit. 1, § 5, n. 10; Id. tit. 18, § 2; and ante, § 111, note 2.

[1] Langstaffe v. Fenwick, 10 Ves. R. 405, 406.

a bond to his wife, without the intervention of trustees, to leave her a sum of money if she should survive him; the bond, although released at law by the marriage, was held good as an agreement in Equity, entitling the wife to satisfaction out of the husband's assets.[1] And so, *e contrà*, where a wife before marriage executed a bond to her husband, to convey all her lands to him in fee; it was upheld in favor of the husband, after the marriage, as an agreement defectively executed, to secure to the husband the land as her portion.[2]

§ 137. We have thus gone over the principal cases, which are supposed to contain contradictions of, or exceptions to, the general rule, that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements or to set aside solemn acts of the parties. Without undertaking to assert that there are none of these cases, which are inconsistent with the rule, it may be affirmed that the real exceptions to it are very few, and generally stand upon some very urgent pressure of circumstances.[3] The rule prevails in England in all cases of compromises of doubtful, and perhaps in all cases of doubted rights; and especially in all cases of family arrangements.[4] It is relaxed in cases where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confi-

[1] Acton *v.* Pearce, 2 Vern. R. 480; S. C. Prec. Ch. 237.

[2] Cannel *v.* Buckle, 2 P. Will. 243; Newl. on Contr. ch. 19, p. 345, 346; 1 Fonbl. Eq. B. 1, ch. 1, § 7.

[3] See Eden on Injunct. ch. 2, p. 8, 9, 10, and note (*b*).

[4] Stewart *v.* Stewart, 6 Clark & Finnell. R. 911, 966 to 971; Pickering *v.* Pickering, 2 Beavan, R. 31, 56.

dence, and surprise.[1] In America, the general rule has been recognized, as founded in sound wisdom and

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[1] Stewart *v.* Stewart, 6 Clark & Finnell. R. 911, 966 to 971. — The English Elementary writers on this subject treat it in a very loose and unsatisfactory manner, laying down no distinct rules when mistakes of the law are, or are not, relievable in Equity; but contenting themselves, for the most part, with mere statements of the cases. Thus Mr. Maddock, after saying that a mistake of parties as to the law is not a ground for reforming a deed, founded on such mistake, and that it has been doubted whether ignorance of law will entitle a party to open an account, proceeds to add, that there are several cases in which a party has been relieved from the consequences of acts, founded on ignorance of the law. He afterwards states that, in general, agreements relating to real or personal estate, if founded on mistake, (not saying whether of law or fact,) will, for that reason, be set aside. 1 Madd. Ch. Pr. 60, 61, 62. Mr. Jeremy says, "That Ignorantia juris non excusat, ignorance of the law will not excuse, is a maxim respected in Equity as well as at law." "A knowledge of the law is consequently presumed, and therefore no mutual explanation of it is *primâ facie* required between the parties to a compact. If one of them should in truth be ignorant of a matter of law, involved in the transaction, and the other should know him to be so and should take advantage of the circumstance, he would, it is conceived, be guilty of a fraud; and although, if both should be ignorant thereof, it would be what is technically called a case of surprise, *it does not appear that this Court will, in any other case, interfere upon a mistake of law.*" Jeremy on Eq. Jurisd. 366. Mr. Fonblanque has collected many of the cases in his valuable notes, but he has not attempted to expound the true principles on which they turn, or the reason of the differences. 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*). Mr. Cooper, (Eq. Plead. p. 140,) disposes of the whole subject with the single remark. "On the ground of mistake or misconception of parties, Courts of Equity have also frequently interfered in a variety of cases." Lord Redesdale leaves it in the same unsatisfactory manner. Mitford, Eq Pl. by Jeremy, p. 129, (edit. 1827.) Mr. Newland (on Contracts in Equity, ch. 28, p. 432) says: "Cases of plain mistake or misapprehension, though not the effect of fraud or contrivance, are entitled to the interference of the Court," (without making any distinction as to law or fact,) and he cites Turner *v.* Turner, 2 Ch. R. 81, Bingham *v.* Bingham, 1 Ves. 126, and Lansdowne *v.* Lansdowne, Moseley, 364. He then adds, that it is different in compromises of doubtful rights. Lord Hardwicke is reported to have said, in Langley *v.* Brown, 2 Atk. 202, "That [if] a person puts a groundless and unguarded confidence in another [it] is not a foundation in a Court of Equity to set aside a deed." This is true in the abstract. But groundless and unguarded confidence often

policy, and fit to be upheld with a steady confidence. And, hitherto, the exceptions to it, (if any,) will be found not to rest upon the mere foundation of a naked mistake of law, however plain and settled the principle may be, nor upon mere ignorance of title founded upon such mistake.[1]

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constitutes, with other circumstances, a most material ingredient for relief.

[1] The general rule is affirmed in Shotwell v. Murray, 1 Johns. Ch. R. 512, 515, and Lyon v. Richmond, 2 Johns. Ch. R. 51, 60, and Storrs v. Barker, 6 Johns. Ch. R. 169, 170, and Dupse v. Thompson, 4 Barbour, S. C. R. 283. In Hunt v. Rousmaniere, 8 Wheaton, R. 211, 214, 215, the Court said: "Although we do not find the naked principle, that relief may be granted on account of ignorance of the law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of Equity." But, when the case came again before the Court, upon appeal, in 1 Peters, Sup. Ct. R. 1, 15, the Court (as has been already stated in the text) said: "We hold the general rule to be, that a mistake of this character, (that is, a mistake arising from ignorance of the law,) is not a ground for reforming a deed, founded on such mistake. And whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters." (Ante, § 116.) But the Court added, that it was not their intention to lay it down, that there may not be cases in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. Id. p. 17. In the case of Marshall v. Collett, 1 Younge &. Coll. 238, Lord Ch. Baron Abinger said, that for mistake of law Equity would not set aside a contract. See also Cockerill v. Cholmeley, 1 Russ. & Mylne, 418, and McCarthy v. Decaix, 2 Russ. & Mylne, R. 614. The question again came under the review of the Supreme Court of the United States in the case of the Bank of the United States v. Daniel, 12 Peters, R. 32, 55, 56, where the main question was, whether a mistake of law was relievable in Equity, it being stripped of all other circumstances; and the court held that it was not. On that occasion the Court said: "The main question, on which relief was sought by the bill, that on which the decree below proceeded, and on which the appellees relied in this Court for its affirmance, is, Can a court of chancery relieve against a mistake of Law? In its examination, we will take it for granted, that the parties, who took up the bill for ten thousand dollars, included the damages of a thousand dollars in the eight thousand dollar note; and did so, believing the statute of Kentucky secured the penalty

§ 138. It is matter of regret, that, in the present state of the law, it is not practicable to present, in any more definite form, the doctrine respecting the effect

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to the bank; and that, in the construction of the statute, the appellees were mistaken. Vexed as the question formerly was, and delicate as it now is, from the confusion in which numerous and conflicting decisions have involved it, no discussion of cases can be gone into without hazarding the introduction of exceptions, that will be likely to sap the direct principle we intend to apply. Indeed, the remedial power claimed by courts of chancery to relieve against mistakes of law, is a doctrine rather grounded upon exceptions, than upon established rules. To this course of adjudication we are unwilling to yield. That mere mistakes of law are not remediable, is well established, as was declared by this Court in Hunt *v.* Rousmaniere, 1 Peters, 15; and we can only repeat what was there said, 'that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character,' and to involve other elements of decision. (1 Story's Eq. Jurisp. § 116.) What is this case; and does it turn upon any peculiarity? Griffing sold a bill to the United States Bank, at Lexington, for ten thousand dollars, indorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky, when the bill was made, and there accepted it; at maturity it was protested for nonpayment, and returned. The debtors applied to take it up, when the creditors claimed ten per cent. damages, by force of the statute of Kentucky. All the parties bound to pay the bill, were perfectly aware of the facts; at least the principals, who transacted the business, had the statute before them, or were familiar with it, as we must presume; they and the bank earnestly believing, (as in all probability most others believed at the time,) that the ten per cent. damages were due by force of the statute, and, influenced by this opinion of the law, the eight thousand dollar note was executed, including the one thousand dollars claimed for damages. Such is the case stated and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief. Testing the case by the principle, 'that a mistake or ignorance of the law, forms no ground of relief from contracts fairly entered into, with a full knowledge of the facts;' and under circumstances repelling all presumptions of fraud, imposition, or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, the question then is, Were the complainants entitled to relief? To which we respond decidedly in the negative." So far, then, as the Courts of the United States are concerned, the question may be deemed finally at rest.

of mistakes of law, or to clear the subject from some obscurities and uncertainties which still surround it. But it may be safely affirmed, upon the highest authority, as a well-established doctrine, that a mere naked mistake of law, unattended with any such special circumstances as have been above suggested, will furnish no ground for the interposition of a Court of Equity; and the present disposition of Courts of Equity is to narrow, rather than to enlarge, the operation of exceptions.[1] It may, however, be added, that, where a judgment is fairly obtained at law upon a contract, and afterwards, upon more solemn consideration of the subject, the point of law, upon which the cause was adjudged, is otherwise decided, no relief will be granted in Equity against the judgment upon the ground of mistake of the law; for that would be to open perpetual sources for renewed litigation.[2]

§ 139. Where a *bonâ fide* purchaser, for a valuable consideration, without notice, is concerned, Equity will not interfere to grant relief in favor of a party, although he has acted in ignorance of his title upon a mistake of law; for in such a case the purchaser has, at least, an equal right to protection with the party

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1 Lord Cottenham, in his elaborate judgment in Stewart *v.* Stewart, 6 Clark & Finnell. 964 to 971, critically examined all the leading authorities upon this subject, and arrived at the same conclusion; and his opinion was confirmed by the House of Lords. Mr. Burge shows, in his learned Commentaries on Colonial and Foreign Law, (vol. 3, p. 742, &c.) that the like rule prevails in the Civil Law, and in foreign countries on the Continent of Europe, where the Civil Law prevails. Kelly *v.* Solari, 9 Mees. & Wels. R. 54, 57, 58, contains a like recognition of the doctrine, by Lord Abinger. See also Great Western Railway Co. *v.* Cripps, 5 Hare, R. 91.

2 Mitf. Pl. Eq. by Jeremy, 131, 132; Lyon *v.* Richmond, 2 Johns. Ch. R. 51.

laboring under the mistake.[1] And where the equities are equal, the Court withholds itself from any interference between the parties.[2]

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1 Ante, § 64 *c*, § 108; Post, § 154, 165, 331, 409, 434, 436.

2 See Malden *v.* Merrill, 2 Atk. 8; Storrs *v.* Barker, 6 Johns. Ch. R. 166, 169, 170. — In the Civil Law, there is much discussion as to the effect of error of [redacted]; and no inconsiderable embarrassment exists in stating, in what cases of error in law the party is relievable, and in what not. It is certain that a wide distinction was made between the operation of errors of law, and errors of fact. In omni parte error in jure non eodem loco, quo facti ignorantia, haberi debebit; cum jus finitum et possit esse, et debeat; facti interpretatio plerumque etiam prudentissimos fallat. Dig. Lib. 22, tit. 6, l. 2. Hence in many cases, error of law will prejudice a party in regard to his rights; but not error of fact, unless in cases of gross negligence. Dig. Lib. 22, tit. 6, l. 7. The general rule of the Civil Law seems to be, that error of law shall not profit those who are desirous of acquiring an advantage or right; nor shall it prejudice those who are seeking their own right. Juris ignorantia non prodest adquirere volentibus; suum vero petentibus non nocet. Dig. Lib. 22, tit. 6, l. 7; Pothier, Pand. Lib. 22, tit. 6, § 2, n. 2, 3. But then this text is differently interpreted by different Civilians. See 2 Evans's Pothier on Oblig. Appendix, No. xviii. p. 408 to 447; Ayliffe, Pand. B. 2, tit. 15, p. 116; 1 Domat, B. 1, tit. 8, § 1, art. 13 to 16. Domat, after saying that error of law is not sufficient, as an error in fact is, to annul contracts, says, that error or ignorance of law hath different effects in contracts; and then he lays down the following rules. (1.) If error or ignorance of law be such, that it is the only cause of a contract, in which one obliges himself to a thing, to which he is otherwise not bound, and there be no other cause for the contract, the cause proving false, the contract is null. (2.) This rule applies, not only in preserving the person from suffering loss, but also in hindering him from being deprived of a right, which he did not know belonged to him. (3.) But, if by an error or ignorance of the law one has done himself a prejudice, which cannot be repaired without breaking in upon the right of another, the error shall not be corrected to the prejudice of the latter. (4.) If the error or ignorance of the law has not been the only cause of the contract, but another motive has intervened, the error will not annul the contract. And he proceeds to illustrate these rules. 1 Domat, B. 1, tit. 18, § 1, art. 13 to 17. See also Ayliffe, Pand. B. 2, tit. 15; Id. tit. 17; 2 Evans's Pothier on Oblig. Appendix, xviii. p. 408; Id. 437; Pothier, Pand. Lib. 22, tit. 6, per tot. Ante, § 111, and note.

§ 140. In regard to the other class of mistakes, that is, mistakes of fact, there is not so much difficulty. The general rule is, that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in Equity. The ground of this distinction between ignorance of law and ignorance of fact seems to be, that, as every man of reasonable understanding is presumed to know the law, and to act upon the rights which it confers or supports, when he knows all the facts, it is culpable negligence in him to do an act, or to make a contract, and then to set up his ignorance of law, as a defence. The general maxim here is, as in other cases, that the law aids those who are vigilant, and not those who slumber over their rights. And this reason is recognized as the foundation of the distinction, as well in the Civil Law as in the Common Law.[1] But no person can be presumed to be acquainted with all matters of fact; neither is it possible, by any degree of diligence, in all cases to acquire that knowledge; and, therefore, an ignorance of facts does not import culpable negligence. The rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side, which would amount to fraud; but also to many cases of innocent ignorance and mistake on both sides.[2] So, if a party has *bonâ fide*

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[1] See Pothier, Pand. Lib. 22, tit. 6, § 3, n. 4, 5, 6, 7; § 4, n. 10, 11; Ayliffe's Pand. B. 2, tit. 15, p. 116; 1 Domat, B. 1, tit. 18, § 1; Doct. & Stud. Dial. 2, ch. 47; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Pooley *v.* Ray, 1 P. Will. 355; Corking *v.* Pratt, 1 Ves. 406; Hitchcock *v.* Giddings, 4 Price, R. 135; Leonard *v.* Leonard, 2 Ball & Beatt. 171, 180 to 184; Pearson *v.* Lord, 6 Mass. R. 81; Garland *v.* Salem Bank, 9 Mass. R. 408; 1 Madd. Ch. Pr. 60 to 64; Daniell *v.* Mitchell, 1 Story, R. 172.

[2] See Miles *v.* Stevens, 3 Burr, 21; Leger *v.* Bonnaffe, 2 Barb. 475. Ignorance of facts and mistake of facts are not precisely equivalent ex-

entirely forgotten the facts, he will be entitled to relief, because, under such circumstances, he acts under the like mistake of the facts, as if he had never known them.[1] Ignorance of Foreign Law is deemed to be ignorance of fact, because no person is presumed to know the Foreign Law; and it must be proved as a fact.[2]

§ 141. The rule, as to ignorance or mistake of facts, entitling the party to relief, has this important qualification, that the fact must be material to the act or contract, that is, that it must be essential to its character, and an efficient cause of its concoction. For though there may be an accidental ignorance or mistake of a fact; yet, if the act or contract is not materially affected by it, the party claiming relief will be denied it. This distinction may be easily illustrated by a familiar case. A buys an estate of B, to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, unknown at the time to both parties, that B has no title (as if there be a nearer heir than B, who was supposed to be dead, but is, in fact, living); in such a case

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pressions. Mistake of facts always supposes some error of opinion as to the real facts; but ignorance of facts may be without any error, but result in mere want of knowledge or opinion. Thus, a man knowing that he has some interest in a parcel of land, may suppose it to be a *life estate*, when it is a *fee*. That is an error, or mistake. But if he is ignorant that there exists any such land, and that he had any title to it, that very ignorance may lead him to form no opinion whatever on the subject. It may be a case of sheer negation of thought. The phrases are, however, commonly used as equivalent in legal discussions. Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R. 287.

[1] Kelly *v.* Solari, 9 Mees. & Wels. 54, 58.

[2] Leslie *v.* Bailie, 2 Younge & Coll. N. R. 91, 96; Haven *v.* Foster, 9 Pick. R. 113, 130; Raynham *v.* Canton, 3 Pick. R. 293; Kenny *v.* Clarkson, 1 Johns. R. 385; Trith *v.* Sprague, 14 Mass. R. 455; Consequa *v.* Willings, 1 Peters, Circ. R. 229.

Equity would relieve the purchaser, and rescind the contract.[1] But, suppose A were to sell an estate to B, whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact it only contained nineteen acres and three fourths of an acre, and the difference would not have varied the purchase in the view of either party; in such a case, the mistake would not be a ground to rescind the contract.[2] [On the other hand, if the vendor represented the land as situated in one county, when it was in fact in another, this is a sufficient mistake to justify a Court in refusing specific performance, although the vendor was innocent of any fraud.[3]]

§ 142. In cases of mutual mistake going to the essence of the contract, it is by no means necessary that there should be any presumption of fraud. On the contrary, Equity will often relieve, however innocent the parties may be. Thus, if one person should sell a messuage to another, which was, at the time, swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party, a Court of Equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of the obli-

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[1] See 1 Evans, Pothier on Oblig. Pt. 1, ch. 1, art. 9, n. 17, 18; Bingham *v.* Bingham, 1 Ves. 126; 1 Fonbl. Eq. B. 1, ch. 2, § 7. See, also, Calverly *v.* Williams, 1 Ves. jr. 210, 211.

[2] See Smith *v.* Evans, 6 Binn. 102; Voorhees *v.* De Meyer, 2 Barb. 37; Mason *v.* Pearson, 2 Johns. R. 37; O'Kill *v.* Whittaker, 1 De Gex & Smale, 83.

[3] Best *v.* Stow, 2 Sandf. Ch. R. 298.

gation of their contract.[1] So, if a person should execute a release to another party upon the supposition founded in a mistake, that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside upon the ground of a mistake.[2] The Civil Law holds the same principle. *Domum emi, cum eam, et ego, et venditor combustam ignoraremus. Nerva, Sabinus, Cassius, nihil venisse, quamvis area maneat, pecuniamque solutam condici possi, aiunt.*[3]

§ 143. The same principle will apply to all other cases, where the parties mutually bargain for and upon the supposition of an existing right. Thus, if a purchaser should buy the interest of the vendor in a remainder in fee, expectant upon an estate tail, and the tenant in tail had at the time, unknown to both parties, actually suffered a recovery, and thus barred the estate in remainder, a Court of Equity would relieve the purchaser, in regard to the contract, purely upon the ground of mistake.[4] [So a mutual mistake of both parties as to the vendor's interest in the land sold is good cause for setting aside the sale.[5]]

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[1] Hitchcock *v.* Giddings, 4 Price, R. 135, 141; S. C. Daniel's R. 1; 2 Kent, Comm. Lect. 39, p. 469, (2d edit.) But see Sugden on Vendors, p. 237, and note 1, 7th edition; Stent *v.* Bailis, 2 P. Will. 220.

[2] Hone *v.* Brether, 12 Simons, R. 465.

[3] Dig. Lib. 18, tit. 1, l. 27; 2 Kent, Comm. Lect. 39, p. 468, 469, (2d edit.); Grotius de Jure Belli, B. 2, ch. 11, § 7. — If the house were partially burnt, the Civilians seemed to have entertained different opinions, whether the vendor was bound by the contract, having an abatement of the price or allowance for the injury, or had an election to proceed or not with the contract, with such an abatement or allowance. See 2 Kent, Comm. Lect. 39, p. 469, (4th edit.); Pothier de Vente, n. 4. Grotius has made some sensible remarks upon the subject of error in contracts, Grotius de Jure Belli, B. 2, ch. 11, § 6.

[4] Hitchcock *v.* Giddings, 4 Price, R. 135; S. C. Daniel's R. 1.

[5] Irick *v.* Fulton, 3 Gratt. 193.

§ 143 *a*. It will make no difference, in the application of the principle, that the subject-matter of the contract be known to both parties to be liable to a contingency, which may destroy it immediately; for if the contingency has, unknown to the parties, already happened, the contract will be void, as founded upon a mutual mistake of a matter, constituting the basis of the contract. Thus, if a life-estate should be sold, and at the time of the sale the estate is terminated by the death of the party in whom the estate is vested, and that fact is unknown to both parties, a Court of Equity would rescind the contract, upon the ground of a mutual mistake of the fact, which constituted the basis of the contract.[1] So, if a horse should be purchased, which is by both parties believed to be alive, but is at the time of the purchase in fact dead, the purchaser would upon the same ground be relieved, by rescinding the contract, if the money was not paid; and if paid, by decreeing the money to be paid back.[2]

§ 143 *b*. The same principle has been applied to the case of a contract between two persons, whereby one contracted for a large sum, as a contingent compensation for his services in prosecuting a claim of the other against a foreign government for an illegal capture, if it should be successful; and at the time of the contract, the claim had, unknown to both parties, been allowed by the foreign government, with a stipulation for a due payment thereof; for the very basis of the contract was future services to be rendered in

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[1] Allen *v.* Hammond, 11 Peters, R. 71.

[2] Ibid.

prosecuting the claim; and unless such services were rendered, there was no consideration to support it.[1]

§ 144. The same principle will apply to cases of purchases, where the parties have been innocently misled under a mutual mistake as to the extent of the thing sold. Thus, if one party thought that he had *bonâ fide* purchased a piece of land, as parcel of an estate, and the other thought he had not sold it, under a mutual mistake of the bargain; that would furnish a ground to set aside the contract; because (as has been said) it is impossible to say, that one shall be forced to give that price for part only, which he intended to give for the whole; or, that the other shall be obliged to sell the whole for what he intended to be the price of part only.[2] [But where by the mutual mistake of vendor and purchaser, as to the duration of a leasehold interest, it was sold for much less than its real value, and the conveyance had been executed, and the purchaser had been in possession some years, the vendor was held entitled to no relief against the representatives of the vendee.[3]]

§ 144 *a*. But here the nature of the purchase often constitutes a material ingredient. Thus, if a purchase is made of a thing in gross, as, for example, of a farm, as containing in gross by estimation a certain number of acres (such a sale is called in the Roman Law, a sale *per aversionem*) by certain boundaries. Then, if

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[1] Allen *v.* Hammond, 11 Peters, R. 63, 71 to 73.

[2] Calverly *v.* Williams, 1 Ves. jr. 210, 211. But see Okill *v.* Whittaker, 1 De Gex & Smale, 83. See also, Richardson *v.* Bleight, 8 B. Monroe, 580.

[3] Okill *v.* Whittaker, 1 De Gex & Smale, 83. And see Churchill *v.* Rogers, 3 Monroe, 81; Best *v.* Stow. 2 Sandf. Ch. R. 298.

the transaction be *bonâ fide*, and both parties be equally under a mistake as to the quantity, but not as to the boundaries, the sale will be binding on both parties, whether the farm contain more or fewer acres.[1]

§ 145. It is upon the same ground that a Court of Equity proceeds, where an instrument is so general in its terms, as to release the rights of the party to property, to which he was wholly ignorant that he had any title, and which was not within the contemplation of the bargain at the time when it was made. In such cases the Court restrains the instrument to the purposes of the bargain, and confines the release to the right intended to be released or extinguished.[2]

§ 146. It is not, however, sufficient in all cases, to give the party relief, that the fact is material; but it must be such as he could not by reasonable diligence get knowledge of, when he was put upon inquiry. For, if by such reasonable diligence he could have obtained knowledge of the fact, Equity will not relieve him; since that would be to encourage culpable negligence. Thus, if a party has lost his cause at law from the want of proof of a fact, which by ordinary diligence he could have obtained, he is not relievable in Equity; for the general rule is, that if the party becomes remediless at law by his own negligence, Equity will leave him to bear the consequence.[3]

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[1] Morris Canal Co. *v.* Emmatt, 9 Paige, R. 168; Stebbins *v.* Eddy, 4 Mason, R. 414; Post, § 195. See Dig. Lib. 18, tit. 6, l. 35, § 5.

[2] Farewell *v.* Coker, cited 2 Meriv. 352; Ramsden *v.* Hylton, 2 Ves. 304.

[3] 1 Fonbl. Eq. B. 1, ch. 3, § 3; Penny *v.* Martin, 4 Johns. Ch. R. 566; Butman *v.* Hussey, 30 Maine, 266; Schroeppell *v.* Shaw, 3 Coms.

§ 147. Nor is it in every case, where even a material fact is mistaken or unknown without any default of the parties, that a Court of Equity will interpose. The fact may be unknown to both parties, or it may be known to one party and unknown to the other. If it is known to one party and unknown to the other, that will in some cases afford a solid ground for relief; as, for instance, where it operates as a surprise, or a fraud, upon the ignorant party.[1] But in all such cases,

451. — The rule of the Civil Law is the same. Sed facti ignorantia ita demum cuique non nocet, si non ei summa negligentia objiciatur. Quod, enim si omnes in civitate sciant, quod ille solus ignorat? Et recte Labeo definit, scientiam neque curiosissimi neque negligentissimi hominis accipiendam; verum ejus, qui eam rem diligenter inquirendo notam habere possit. Dig. Lib. 22, tit. 6, l. 9, § 2; Pothier, Pand. Lib. 22, tit. 6, § 4, n. 11. In the late case of Bell *v.* Gardner, 4 Mann. & Granger, 11, 24, it was held, that, at law, a promise to pay a note under ignorance of facts, but where the party had the *means* of knowledge, and might have made inquiry, did not bind him. The same point was decided in Kelly *v.* Solari, 9 Mees. & Welsb. 54, and Lucas *v.* Worswick, 1 Mood. & Rob. 293. All these cases at law proceed upon the ground, that a mistake of material facts will avoid a promise made on the foundation of that mistake, even when he had the means of knowledge within his reach. But Courts of Equity proceed upon a somewhat differently modified doctrine. If relief can be given at law, then there is no ground for any application to a Court of Equity for relief. But if a Court of Equity is asked to give relief in a case not fully remediable at law, or not remediable at all at law, then it grants it upon its own terms, and according to its own doctrines. It gives relief only to the vigilant and not to the negligent; to those who have not been put upon their diligence to make inquiry, and not to those who, being put upon inquiry, have chosen to omit all inquiry, which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. In short, it refuses all its aid to those who, by their own negligence, and by that alone, have incurred the loss, or may suffer the inconvenience. It is one thing to act under a mistake of fact, having the means of inquiry, but without being aware of the necessity of ascertaining the facts, and quite a different thing to omit all inquiry in due season, when the party is aware of the necessity and the mode of the inquiry is pointed out to him, or is within his reach. See Post, § 400, 400 *a*.

[1] Jeremy on Eq. Jurisd. B. 3, ch. 2, p. 366, 367; Id. ch. 3, p. 387;

the ground of relief is, not the mistake or ignorance of material facts alone; but the unconscientious advantage taken of the party by the concealment of them.[1] For if the parties act fairly, and it is not a case where one is bound to communicate the facts to the other, upon the ground of confidence, or otherwise, there the Court will not interfere. Thus, if A, knowing that there is a mine in the land of B, of which he knows that B is ignorant, should buy the land without disclosing the fact to B, for a price in which the mine is not taken into consideration, B would not be entitled to relief from the contract; because A, as the buyer, is not obliged, from the nature of the contract, to make the discovery.[2]

§ 148. And it is essential, in order to set aside such a transaction, not only that an advantage should be taken; but it must arise from some obligation in the party to make the discovery; not from an obligation in point of morals only, but of legal duty. In such a case the Court will not correct the contract, merely because a man of nice morals and honor would not have entered into it. It must fall within some definition of fraud or surprise.[3] For, the rules of law must be so drawn, as not to affect the general transactions of mankind, or to require that all persons should, in

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Leonard *v.* Leonard, 2 Ball & Beatt. 179, 180, and the case cited in Mortimer *v.* Capper, by the Lord Chancellor, 4 Brown, Ch. R. 158; 6 Ves. 24; Gordon *v.* Gordon, 3 Swanst. 462, 467, 471, 473, 476, 477.

[1] See East India Company *v.* Donald, 9 Ves. 275; Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 74, 103, 114.

[2] Post, § 207, note.

[3] Fox *v.* Mackreth, 2 Bro. Ch. R. 420; 1 White & Tudor's Eq. Lead. Cas. 72; 1 Madd. Eq. Pl. 63, 64; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*); Earl of Bath and Montague's Case, 3 Ch. Cas. 56, 74, 103, 114.

all respects, be upon the same level as to information, diligence, and means of judgment. Equity, as a practical system, although it will not aid immorality, does not affect to enforce mere moral duties. But its policy is to administer relief to the vigilant, and to put all parties upon the exercise of a searching diligence.[1] Where confidence is reposed, or the party is intentionally misled, relief may be granted; but in such a case there is the ingredient of what the law deems a fraud. Cases falling under this predicament, will more properly come in review in a subsequent part of this work.[2]

§ 149. A like principle applies to cases where the means of information are open to both parties; and where each is presumed to exercise his own skill, diligence, and judgment, in regard to all extrinsic circumstances. In such cases Equity will not relieve. Thus, if the vendee is in possession of facts, which will materially enhance the price of the commodity, and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid.[3] It has been justly observed, that it would be difficult to circumscribe the contrary doctrine within proper limits, where the intel-

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[1] 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*h*).

[2] See Leonard *v.* Leonard, 2 Ball & Beatt. R. 179, 180; Gordon *v.* Gordon, 3 Swanst. 463, 467, 470, 473, 476, 477. — See, on this subject, 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*); Jeremy on Eq. Jurisd. 383, &c.; 1 Madd. Eq. Pr. 204, &c.; Laidlaw *v.* Organ, 2 Wheat. R. 178; Pothier de Vente, n. 233 to 241; 2 Wheat. R. 185, note; Smith *v.* Bank of Scotland, 1 Dow, Parl. R. 294; Pidcock *v.* Bishop, 3 B. & Cressw. 605; Etting *v.* Bank of U. S.; 11 Wheat. R. 59, and cases there cited; Post. § 260 to 273, 308 to 328.

[3] Laidlaw *v.* Organ, 2 Wheat. R. 178, 195.

ligence is equally accessible to both parties.[1] And, where it is not, the same remark applies with the same force, if it is not a case of mutual confidence, or of a designed misleading of the vendor.[2] Thus, if a vendee has private knowledge of a declaration of war, or of a treaty of peace, or of other political arrangements, (in respect to which men speculate for themselves,) which materially affect the price of commodities, he is not bound to disclose the fact to the vendor at the time of his purchase; but, at least in a legal and equitable sense, he may innocently be silent. For there is no pretence to say, that upon such matters men repose confidence in each other, any more than they do in regard to other matters, affecting the rise and fall of markets.[3] The like principle applies to all other cases, where the parties act upon their own judgment in matters mutually open to them. Thus, if an agreement for the composition of a cause is fairly made between parties with their eyes open, and rightly informed, a Court of Equity will not overhaul it, although there has been a great mistake in the exercise of their judgment.[4]

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1 Ibid.

2 Pothier, in his Treatise on the subject of Sales, has treated this subject with great ability; and has cited the doctrines of the civil law, and the discussions of civilians and writers upon natural law on this subject. While he contends strenuously for the doctrine of good faith and full discovery in all cases; he is compelled to admit, that the doctrines *in foro conscientiæ* have had little support in judicial tribunals, and, indeed, are not easily applicable to the common business of life. Indeed he admits, that, though concealment of material facts by the vendee, which may enhance the price, is wrong *in foro conscientiæ*; yet, that it would too much restrict the freedom of commerce to apply such a rule in civil transactions. See Pothier, Traité de Vente, P. 2, ch. 2, n. 233; Id. Pt. 3, § 2, n. 294 to 298; 2 Wheat. R. 185, note (*c*).

3 Ibid.

4 Brown *v.* Pring, 1 Ves. 408.

§ 150. In like manner, where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a Court of Equity will not interpose.[1] For in such cases the Equity is deemed equal between the parties; and, when it is so, a Court of Equity is generally passive, and rarely exerts an active jurisdiction. Thus, where there was a contract by A to sell to B, for £20, such an allotment, as the commissioners under an inclosure act should make for him; and neither party at the time knew what the allotment would be, and were equally in the dark as to the value; the contract was held obligatory, although it turned out upon the allotment to be worth £200.[2] The like rule will apply to all cases of sale of real estate or personal estate, made in good faith, where material circumstances, affecting the value, are equally unknown to both parties.

§ 151. The general ground upon which all these distinctions proceed, is, that mistake or ignorance of facts in parties, is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party.

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[1] 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); 1 Powell on Contr. 200; 1 Madd. Ch. Pr. 62 to 64.

[2] Cited in Mortimer *v.* Capper, 2 Bro. Ch. R. 158; 6 Ves. 24; 1 Madd. Eq. Pr. 63; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*). See also Pullen *v.* Ready, 2 Atk. R. 592; Gordon *v.* Gordon, 3 Swanst. 463, 467, 470, 471, 473, 476, 477; Ainslie *v.* Medlycott, 9 Ves. 13.

But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *Damnum absque injuria.*[1]

§ 152. One of the most common classes of cases, in which relief is sought in Equity, on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes, by mistake, the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent.[2] In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, Equity will reform the contract, so as to make it conformable to the precise intent of the parties.[3] But if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, Equity will withhold relief; upon the ground, that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy.[4]

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[1] See Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358; Okill *v.* Whittaker, 1 De Gex & Smale, R. 83; S. C. 2 Phil. Ch. R. 388; McAninch *v.* Laughlin, 13 Penn. St. Rep. 371.

[2] See Durant *v.* Durant, 1 Cox, R. 58; Calverley *v.* Williams, 1 Ves. R. 210.

[3] See O'Neil *v.* League, 8 Ala. 345.

[4] Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 338, 311; Henkle *v.* Royal Assur. Company, 1 Ves. 317; Davis *v.* Symonds, 1 Cox, R. 404; Townshend *v.* Stangroom, 6 Ves. 332 to 338; Woolman *v.* Hearn, 7 Ves. 217, 218; Gillespie *v.* Moon, 2 Johns. Ch. R. 585; Lyman *v.* United Ins. Co., 2 Johns. Ch. R. 630; Graves *v.* Boston Marine Insur. Co., 2 Cranch, 442, 444; Clapton *v.* Martin, 11 Ala. 187.

§ 153. It has, indeed, been said that, where there is a written agreement, the whole sense of the parties is presumed to be comprised therein; that it would be dangerous to make any addition to it in cases where there does not appear to be any fraud in leaving out any thing; and that it is against the policy of the Common Law to allow parol evidence to add to, or vary the terms of, such an agreement.[1] As a general rule, there is certainly much to recommend this doctrine. But however correct it may be, as a general rule, it is very certain, that Courts of Equity will grant relief upon clear proof of a mistake, notwithstanding that mistake is to be made out by parol evidence.[2] Lord Hardwicke, upon an occasion of this sort, said: "No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that, if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified."[3] And this doctrine has been recognized upon many other occasions.[4]

[1] 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (*o*); Irnham *v.* Child, 1 Bro. Ch. 92, 93; Woolam *v.* Hearn, 7 Ves. 211; Rich *v.* Jackson, 4 Bro. Parl. R. 514; S. C. 6 Ves. 334, note; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432; Davis *v.* Symonds, 1 Cox, R. 402, 404.

[2] Marquis of Townshend *v.* Stangroom, 6 Ves. 332, 333; 1 Fonbl. Eq. B. 1, ch. 3, § 11; Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 338, 350; Simpson *v.* Vaughan, 2 Atk. 31; Wooden *v.* Haviland, 18 Conn. 101; Langley *v.* Brown, 2 Atk. 203.

[3] Henkle *v.* Royal Assur. Co., 1 Ves. 314. See Townshend *v.* Stangroom, 6 Ves. 332 to 339; Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 338, 350; Sugden on Vendors, p. 146 to 159, (7th edit.); Hunt *v.* Rousmaniere, 8 Wheat. R. 211; S. C. 1 Peters, Sup. C. R. 13.

[4] Ibid.; Morteux *v.* London Assur. Co., 1 Atk. R. 545; Gillespie *v.* Moon, 2 Johns. Ch. R. 585; Lyman *v.* United Insur. Co., 2 Johns. Ch. R. 630; Smith *v.* Greeley, 14 N. H. R. 378; Simpson *v.* Vaughan, 2

§ 154. It is difficult to reconcile this doctrine with that rule of evidence at the Common Law, which studiously excludes the admission of parol evidence to vary or control written contracts. The same principle lies at the foundation of each class of decisions, that is to say, the desire to suppress frauds, and to promote general good faith and confidence in the formation of contracts. The danger of setting aside the solemn engagements of parties, when reduced to writing, by the introduction of parol evidence, substituting other material terms and stipulations, is sufficiently obvious.[1] But what shall be said, where those terms and stipulations are suppressed, or omitted, by fraud or imposition? Shall the guilty party be allowed to avail himself of such a triumph over innocence and credulity, to accomplish his own base designs? That would be to allow a rule, introduced to suppress fraud, to be the most effectual promotion and encouragement of it. And, hence, Courts of Equity have not hesitated to entertain jurisdiction to reform all contracts, where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding to some extent it breaks in upon the uniformity of the rule, as to the

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Atk. 33; Langley *v.* Brown, 2 Atk. 203; Bust *v.* Barlow, 3 Bro. Ch. R. 454; 5 Ves. 595; Irnham *v.* Child, 1 Bro. Ch. R. 94; Baker *v.* Paine, 1 Ves. 457; Crosby *v.* Middleton, Pr. Ch. 309; Wiser *v.* Blachley, 1 Johns. Ch. R. 607; South Sea Co. *v.* D'Oliffe, cited 1 Ves. 317; 2 Ves. 377; 5 Ves. 601; Pitcairne *v.* Ogbourne, 2 Ves. 375; 1 Fonbl. Eq. B. 1, ch. 3, § 11, and note (*o*); Mitf. Pl. 127, 128; Clowes *v.* Higginson, 1 Ves. & Beames, 524; Ball *v.* Storie, 1 Sim. & Stu. R. 210; Marshall on Insurance, B. 1, ch. 8, § 4; Clinan *v.* Cooke, 1 Sch. & Lefr. 32, &c. See Sugden on Vendors, p. 146 to 159, (7th edit.); Andrews *v.* Essex F. & M. Insur. Co., 3 Mason, R. 10; Parsons *v.* Rignold, 13 Simons, R. 518.

[1] See Woolam *v.* Hearn, 7 Ves. 219.

exclusion of parol evidence to vary or control contracts; wisely deeming such cases to be a proper exception to the rule, and proving its general soundness.[1]

§ 155. It is upon the same ground that Equity interferes in cases of written agreements, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake. To allow it to prevail in such a case, would be to work a surprise, or fraud, upon both parties; and certainly upon the one who is the sufferer. As much injustice would to the full be done under such circumstances, as would be done by a positive fraud, or an inevitable accident.[2] A Court of Equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of parties. It would be to allow an act, originating in innocence, to operate

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[1] Newl. Eq. Contr. ch. 19; 1 Eq. Abridg. 20, pl. 5; Filmer *v.* Gott, 4 Bro. Parl. Cas. 230; 1 Fonbl. Eq. B. 1, ch. 2, § 8; Id. ch. 3, § 4, and note (*n*); Irnham *v.* Child, 1 Bro. Ch. R. 92; Portmore *v.* Morris, 2 Bro. Ch. R. 219; 1 Eq. Abridg. 19; Id. 20, Agreements, B.; Hunt *v.* Rousmaniere, 8 Wheat. R. 211; S. C. 1 Peters, Sup. C. R. 13.—In cases of this sort it is often said, that the admission of the parol evidence to establish fraud, or circumvention, is not so much to vary the contract as to establish something collateral to it, which shows that it ought not to be enforced. Davis *v.* Symonds, 1 Cox, R. 402, 404, 405. But in cases of mistake, the party often seeks to enforce the contract after insisting upon its being reformed. See 3 Starkie on Evid. Pt. 4, p. 1015, 1016, 1018; Pitcairne *v.* Ogbourne, 2 Ves. 375, 376; Baker *v.* Paine, 1 Ves. 456. See also Atty. Genl. *v.* Sitwell, Younge & Coll. 559, 582, and the remarks of Mr. Baron Alderson against the admission of parol evidence in such cases. Post, § 161, p. 183, note (1).

[2] Joynes *v.* Statham, 3 Atk. 389; Ramsbottom *v.* Golden, 1 Ves. & Beames, R. 168; 1 Fonbl. Eq. B. 1, ch. 2, § 8, note (*z*); Id. § 7, note (*v*).

ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule framed to promote it.[1] In a practical view, there would be as much mischief done by refusing relief in such cases, as there would be introduced by allowing parol evidence in all cases to vary written contracts.

§ 156. We must, therefore, treat the cases, in which Equity affords relief, and allows parol evidence, to vary and reform written contracts and instruments, upon the ground of accident and mistake, as properly forming, like cases of fraud, exceptions to the general rule, which excludes parol evidence, and as standing upon the same policy as the rule itself.[2] If the mistake should be admitted by the other side, the Court would certainly not overturn any rule of Equity by varying the deed; but it would be an Equity *dehors* the instrument.[3] And if it should be proved by other evidence entirely satisfactory, and equivalent to an admission, the reasons for relief would seem to be equally cogent and conclusive.[4] It would be a great defect in the moral jurisdiction of the Court, if, under such circumstances, it were incapable of administering relief.[5]

[1] Townshend *v.* Stangroom, 6 Ves. 336, 337; Gillespie *v.* Moon, 2 Johns. Ch. R. 596; Joynes *v.* Statham, 3 Atk. 385; 3 Starkie, Evid. Pt. 4, p. 1018, 1019; Pitcairne *v.* Ogbourne, 2 Ves. R. 377, and South Sea Company *v.* D'Oliffe, there cited.

[2] Joynes *v.* Statham, 3 Atk. 388; Ramsbottom *v.* Golden, 1 Ves. & Beam. R. 168; 1 Fonbl. Eq. B. 1, ch. 2, § 11, note (*o*); Mitf. Eq. Pl. by Jeremy, 129; Clowes *v.* Higginson, 1 Ves. & Beam. R. 526, 527; Ball *v.* Storie, 1 Sim. & Stu. 210.

[3] Davis *v.* Symonds, 1 Cox, R. 404, 405.

[4] Irnham *v.* Child, 1 Bro. Ch. R. 92, 93.

[5] See Townshend *v.* Stangroom, 6 Ves. 336, 337; Gillespie *v.* Moon, 2 Johns. Ch. R. 596.

§ 157. And this remark naturally conducts us back again to the qualification of the doctrine, (already stated,) which is insisted upon by Courts of Equity. Relief will be granted in cases of written instruments, only where there is a plain mistake, clearly made out by satisfactory proofs.[1] It is true, that this, in one sense, leaves the rule somewhat loose, as every Court is still left free to say, what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity belonging to the administration of justice generally; for, in many cases, different judges will differ as to the result and weight of evidence; and, consequently, they may make different decisions upon the same evidence.[2] But the qualification is most material, since it cannot fail to operate as a weighty caution upon the minds of all judges; and it forbids relief, whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt, or to opposing presumptions.[3]

§ 158. Many of the cases included under this head have arisen under circumstances, which brought them

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[1] Gillespie *v.* Moon, 2 Johns. Ch. R. 595 to 597; Lyman *v.* United Insurance Company, 2 Johns. Ch. R. 630; Henkle *v.* Royal Assurance Company, 1 Ves. 317; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 368; Id. ch. 4, p. 490, 491; Townshend *v.* Stangroom, 6 Ves. 328, 339.

[2] See Lord Eldon's Remarks in Townshend *v.* Stangroom, 6 Ves. 333, 334.

[3] Lord Thurlow, in one case, said, that the final evidence must be strong irrefragable evidence. Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 347. If, by this language, his Lordship only meant, that the mistake should be made out by evidence clear of all reasonable doubt, its accuracy need not be questioned. But if he meant, that it should be in its nature or degree incapable of refutation, so as to be beyond any doubt and beyond controversy, the language is too general. See Attorney-General *v.* Sitwell, 1 Younge & Coll. 583.

within the reach of the Statute of Frauds, (as it is commonly called,) which requires certain contracts to be in writing. But the rule, as to rejecting parol evidence to contradict written agreements, is by no means confined to such cases. It stands, as a general rule of law, independent of that statute.[1] It is founded upon the ground that the written instrument furnishes better evidence of the deliberate intention of the parties, than any parol proof can supply.[2] And the exceptions to the rule, originating in accident and mistake, have been equally applied to written instruments within and without the Statute of Frauds. Thus, for instance, relief has been granted or refused, according to circumstances, in cases of asserted mistakes in policies of insurance, even after a loss has taken place.[3] And, in the same manner, Equity has interfered in other cases of contract, not only of a commercial nature, but of any other nature.[4]

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[1] Woolam *v.* Hearn, 7 Ves. 218; 1 Fonbl. Eq. B. 1, ch. 2, § 11, note (*v*); Clowes *v.* Higginson, 1 Ves. & Beames, R. 526; Pitcairne *v.* Ogbourne, 2 Ves. 375; Sugden on Vendors, ch. 3, § 3; Parteriche *v.* Powlet, 2 Atk. 383, 384; 3 Starkie on Evid. Pt. 4, tit. Parol Evid. p. 995 to 1020; Davis *v.* Symonds, 1 Cox, R. 402, 404, 405.

[2] Ibid.

[3] Motteux *v.* London Assur. Co. 1 Atk. 545; Henkle *v.* Royal Ex. Assur. Co. 1 Ves. 317; Lyman *v.* United Insur. Co. 2 Johns. Ch. R. 630; Head *v.* Boston Mar. Ins. Co. 2 Cranch, 419, 444; Marsh. Insur. B. 1, ch. 8, § 4; Id. Andrews *v.* Essex Fire and Mar. Ins. Co. 3 Mason, R. 10; Delaware Ins. Co. *v.* Hogan, 2 Wash. Cir. R. 5.

[4] Baker *v.* Paine, 1 Ves. 456; Getman's Executors *v.* Beardsley, 2 Johns. Ch. R. 274; Simpson *v.* Vaughan, 2 Atk. 30; Bishop *v.* Church, 2 Ves. 100, 371; Thomas *v.* Frazer, 3 Ves. 399; Finley *v.* Lynn, 6 Cranch, 238; Mitf. Pl. Eq. by Jeremy, 129, 130; Pitcairne *v.* Ogbourne, 2 Ves. 375, and South Sea Company *v.* D'Oliffe, there cited, p. 377; 3 Starkie, Evid. Pt. 4, p. 1019; Underhill *v.* Harwood, 10 Ves. 225, 226; Edwin *v.* East India Company, 2 Vern. 210; Edwards *v.* Child, 2 Vern. 727.

§ 159. The relief granted by Courts of Equity, in cases of this character, is not confined to mere executory contracts, by altering and conforming them to the real intent of the parties; but it is extended to solemn instruments, which are made by the parties, in pursuance of such executory or preliminary contracts. And, indeed, if the Court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence, in preliminary contracts for conveyances, settlements, and other solemn instruments, the Court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it, as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed. And if such conveyance or instrument has been executed, it reforms the latter also, by making it such as the parties originally intended.[1]

§ 160. There is less difficulty in reforming written instruments, where the mistake is mainly or wholly made out by other preliminary written instruments or memorandums of the agreement. The danger of public mischief, or private inconvenience, is far less in such cases than it is in cases where parol evidence is admitted. And, accordingly, Courts of Equity interfere with far less scruple to correct mistakes in the former, than mistakes in the latter.[2] Thus, marriage

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[1] See Newland on Contr. ch. 19, p. 338 to 347; Mitford Eq. Pl. by Jeremy, 128, 129, 130; Sugden on Vendors, p. 146 to 159, (7th edit.); South Sea Company *v.* D'Oliffe, cited 2 Ves. 377; 2 Atk. 525; Henkle *v.* Royal Ex. Assurance Comp. 1 Ves. 318, 417; Baker *v.* Paine, 1 Ves. 456. But see Atty.-Genl. *v.* Sitwell, 1 Younge & Coll. 559, 582; Post, § 161, p. 182, note (1); Hodgkinson *v.* Wyatt, 9 Beavan, R. 566.

[2] Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 368, 369, ch. 4, § 5, p. 490, 491; Durant *v.* Durant, 1 Cox, R. 58; Grounds and Rudim. of the Law, M. 113, p. 81; (edit 1751); Toth. 229, [131].

settlements are often reformed, and varied, so as to conform to the previous articles; and conveyances of real estate are in like manner controllable by the terms of the prior written contract.[1] Memorandums of a less formal character are also admissible for the same purpose.[2] But in all such cases it must be plainly made out, that the parties meant, in their final instruments, merely to carry into effect the arrangements designated in the prior contract or articles. For, as the parties are at liberty to vary the original agreement, if the circumstances of the case lead to the supposition that a new intent has supervened, there can be no just claim for

[1] The cases on this head are exceedingly numerous. Many of them will be found collected in Newland on Contr. ch. 19, p. 337; Com. Dig. Chancery, 3 Z 11, 12; 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, § 7, and notes; 2 Bridg. Dig. Marriage, ii. p. 300; 1 Fonbl. Eq. B. 1, ch. 2, § 7, note (*v*); Chitty, Eq. Dig. Settlement on Marriage, ix.; Randall *v.* Randall, 2 P. Will. 464; Randall *v.* Willis, 5 Ves. 275; West *v.* Erissey, 2 P. Will. 349, and Mr. Cox's note (1), p. 355; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 378 to 382; 3 Starkie, Evid. tit. Parol Evid. 10, 19; Barstow *v.* Kilvington, 5 Ves. 592; Rogers *v.* Atkinson, 1 Kelly, 12, 238. In cases of marriage articles, the Court will frequently give a construction to the words more favorable to the presumed intent of the parties, than it does in some other cases. Thus, in marriage articles, if there be a limitation to the parents for life, with remainder to the heirs of their bodies, the latter words are, in Equity, generally construed to be words of purchase; and, accordingly, the Court will carry such articles into effect by way of a strict settlement. Newland on Contr. ch. 19, p. 337; Fearne on Conting. Rem. p. 90 to 113, (7th edit. by Butler); 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, § 7, and notes, § 16, note (*e*); Randall *v.* Willis, 5 Ves. 275; West *v.* Erissey, 2 P. Will. 349; and Mr. Cox's note, Id. (1); Heneage *v.* Hunloke, 2 Atk. 455, and Sanders's note, Id. 457, (1); Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 378 to 382; Taggart *v.* Taggart, 1 Sch. & Lef. 84; Blackburn *v.* Staples, 2 V. & Beam. 368, 369; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 377, 378, 379; Harbridge *v.* Wogan, 5 Hare, R. 649.

[2] Motteux *v.* London Assurance Company, 1 Atk. R. 545; Baker *v.* Paine, 1 Ves. 456.

relief upon the ground of mistake.[1] The very circumstance, that the final instrument of conveyance or settlement differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract.[2] It is upon a similar ground that Courts of Equity, as well as Courts of Law, act, in holding, that where there is a written contract, all antecedent propositions, negotiations, and parol interlocutions on the same subject, are to be deemed merged in such contract.[3]

§ 161. In cases of asserted mistake in written contracts, where the mistake is to be established by parol evidence, the question has often been mooted, how far a Court of Equity ought to be active in granting relief, by a specific performance in favor of the party, seeking to reform the contract upon such parol evidence, and to obtain performance of it, when it shall stand reformed. It is admitted that a defendant, against whom a specific performance of a written agreement is sought, may insist, by way of answer, upon the mistake,

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[1] 1 Fonbl. Eq. B. 1, ch. 3, § 11, note (*p*); Id. ch. 6, § 1, 13; Legg *v.* Goldwire, Cas. Temp. Talb. 20; West *v.* Erissey, 2 P. Will. 349, and Mr. Cox's note (1), 355; Beaumont *v.* Bromley, 1 Turn. & Russ. R. 41; Hawkins *v.* Jackson, 2 Mac. & Gord. 372; Jeremy on Eq. Jurisd. Pt. 2, ch. 2, p. 379, 380; Id. 50, 51, 52, 53; ch. 4, § 5, p. 490, 491; Id. 1 Madd. Eq. Pr.

[2] Ibid.

[3] Rich *v.* Jackson, 4 Bro. Ch. R. 513; S. C. 6 Ves. 334, note; Pickering *v.* Dawson, 4 Taunt. 786; Kain *v.* Old, 2 B. & Cressw. 634; Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. R. 273; S. C. 14 Johns. R. 15; 1 Fonbl. Eq. B. 1, ch. 3, § 8, 11; Davis *v.* Symonds, 1 Cox, R. 402, 404; Vandervoort *v.* Smith, 2 Cain. R. 155.

as a bar to such a bill; because he may insist upon any matter which shows it to be inequitable to grant such relief. A Court of Equity is not, like a Court of Law, bound to enforce a written contract; but it may exercise its discretion when a specific performance is sought, and may leave the party to his remedy at law.[1] It will not, therefore, interfere to sustain a bill for a specific performance, when it would be against conscience and justice so to do. On the other hand, it seems equally clear, that a party may, as plaintiff, have relief against a written contract, by having the same set aside and cancelled, or modified, whenever it is founded in a mistake of material facts, and it would be unconscientious and unjust for the other party to enforce it at Law or in Equity.[2] But the case, intended to be put differs from each of these. It is, where the party plaintiff seeks, not to set aside the agreement, but to enforce it, when it is reformed and varied by the parol evidence. A very strong inclination of opinion has been repeatedly expressed by the English Courts, not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence. On various occasions such relief has, under such circumstances,

[1] Com. Dig. Chancery, 2 C. 16; Joynes *v.* Statham, 3 Atk. 388; Garrard *v.* Grinling, 2 Swanst. R. 257; Pitcairne *v.* Ogbourne, 2 Ves. 375; Legal *v.* Miller, 2 Ves. 299; Mason *v.* Armitage, 13 Ves. 25; Clark *v.* Grant, 14 Ves. 519; Hepburn *v.* Dunlop, 1 Wheat. 197; Clowes *v.* Higginson, 1 Ves. & B. 524; Winch *v.* Winchester, 1 Ves. & B. R. 375; Ramsbottom *v.* Golden, 1 Ves. & B. 165; Flood *v.* Finley, 2 Ball & B. 53; Clark *v.* Grant, 14 Ves. 519; Gillespie *v.* Moon, 2 Johns. Ch. R. 585, 598; Townshend *v.* Stangroom, 6 Ves. 328; Price *v.* Dyer, 17 Ves. 357.

[2] See Ball *v.* Storie, 1 Sim. & Stu. R. and the cases there cited.

been denied.[1] But it is extremely difficult to perceive the principle, upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the Court to reform written contracts, and to decree relief thereon.[2] In America, Mr. Chan-

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[1] See Woolam *v.* Hearn, 7 Ves. 211; Higginson *v.* Clowes, 15 Ves. 516; Clinan *v.* Cooke, 1 Sch. & Lef. 38, 39; Clowes *v.* Higginson, 1 Ves. & B. 524; Winch *v.* Winchester, 1 Ves. & B. 375; Osborn *v.* Phelps, 19 Conn. 63; Best *v.* Stow, 2 Sandf. Ch. R. 298; Miller *v.* Chitwood, 1 Green, Ch. R. 199; Elder *v.* Elder, 10 Maine, 80; Westbrook *v.* Horbesson, 2 McCord, Ch. R. 112; Clark *v.* Grant, 14 Ves. 519; Rich *v.* Jackson, 6 Ves. 335; 4 Bro. Ch. R. 514; Ogilvie *v.* Foljambe, 3 Meriv. R. 53, 63; Townshend *v.* Stangroom, 6 Ves. 328; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 4, § 1, p. 432; Clark *v.* Grant, 14 Ves. 519; Baker *v.* Paine, 1 Ves. 457; Gordon *v.* Uxbridge, 2 Madd. R. 106; Atty.-Gen. *v.* Sitwell, 1 Younge & Coll. 559, 582; Manser *v.* Back, 6 Hare, 443.

[2] Mr. Baron Alderson in Atty.-Gen. *v.* Sitwell, 1 Younge & Coll. 559, 582, 583,) expressed a strong opinion against the reforming of a contract, and then decreeing the performance of it in Equity. In that case the question was, whether by a memorandum of agreement to sell a certain manor of the Crown "with the appurtenances," an advowson appurtenant or appendant thereto passed; the statute of 17 Edward 2, ch. 13, having distinctly provided, that the King shall not convey an advowson without express words to that effect. Mr. Baron Alderson, in delivering his judgment said: "The second objection is upon the terms of the contract. The plaintiffs professed to sell the manor of *Eckington* 'with the appurtenances;' and as the appurtenances of a manor ordinarily include an advowson appendant or appurtenant, the defendant contends, that he is not bound to take the property, unless there be a conveyance to him in the terms of the memorandum, in which the plaintiffs executed the contract; and that the Crown must either give him the manor without excluding the advowson, or otherwise, that the contract ought not to be performed. If the question was one between subject and subject, there would, I think, be great difficulty in decreeing the execution of the contract upon any other terms than those for which the defendant contends. It appears to me quite clear, that the memorandum of agreement would carry this advowson under the general words 'with the appurtenances.' There are various authorities to that effect; and I may more particularly refer to Viner's Abridgment, tit. *Prerog.* (C. c.) 9. This would have been clear, therefore, as between subject and subject. And in that case, the next question, which would have arisen, would have been, — whether or not, on the ground of mistake, one party not intending to sell, and the other not intending to pur-

cellor Kent, after a most elaborate consideration of the subject, has not hesitated to reject the distinction, as unfounded in justice, and has decreed relief to a plaintiff, standing in the precise predicament.[1]

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chase the advowson, I could have reformed the agreement, and have directed the specific performance of it, when so reformed. I confess I should have had great difficulty in holding, that this could be done; because I cannot help feeling, that, in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the Statute of Frauds. The only ground, on which I think the case could have been put, would have been that the answer contained an admission of the agreement as stated in the bill; and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law, where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case it would seem as if, the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider, whether, according to the dicta of many venerable judges, I should not have been authorized to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass. But, in my present view of the question, it seems to me that the Court ought not in any case, where the mistake is denied, or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement."

[1] Gillespie *v.* Moon, 2 Johns. Ch. R. 585; Keisselbrack *v.* Livingston, 4 Johns. Ch R. 144. [But this decision of Gillespie *v.* Moon, has not always been followed in this country. See Osborne *v.* Phelps, 19 Conn. 62. See Elder *v.* Elder, 10 Maine, 80; Thomas *v.* McCormick, 9 Dana, 108.] See also Baker *v.* Paine, 1 Ves. 456; Shelburne *v.* Inchiquin, 1 Bro. Ch. R. 339; Joynes *v.* Statham, 3 Atk 388; 6 Ves. 337, 338; Ball *v* Storie, 1 Sim. & Stu. 210, Burn *v.* Burn, 8 Ves. 573, 583; 1 Eq. Abridg. 20, Pl. 5; Sims *v.* Urrey, 2 Ch. Cas. 225; S. C. Freem R. 16; Jalabert *v.* Chandos, 1 Eden, R. 372; Pember *v.* Matthews, 1 Bro Ch. R. 52, Jones *v.* Sheriff, cited 9 Mod. 88; The Hiram, 1 Wheaton, R. 441; Hunt *v.* Rousmaniere, 8 Wheaton, R. 211; 1 Peters, Sup C. R. 13, Hogan *v.* Delaware Insur. Co. 1 Wash. C. C. R. 422, Shelburne *v.* Inchiquin, 3 Bro. Ch. R. 338; Walker *v.* Walker, 2 Atk. 98; Tilton *v.* Tilton, 9 N. H. R. 385; Tyson *v.* Passmore, 2 Barr, 122, Bellows *v.* Stone, 14 N. H. 175; Hyde *v.* Tanner, 1 Barb. 75; Bailey *v.* Bailey, 8 Humph. 230. But see 1 Sch. & Lefr 30; Kekewich, Eq. Dig. Equity I. — The distinction stated in the text is certainly of a very artificial cha-

§ 162. Courts of Equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established; but also when it is fairly implied from the nature of the transaction. Thus, in cases where there has been a joint loan of money to two or more obligors, and they are by the instrument made jointly liable, but not jointly and severally, the Court has reformed the bond, and made it joint and several, upon the reasonable presumption,

racter, and difficult to be reconciled with the general principles of Courts of Equity It is in effect a declaration, that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not in *favor* of a plaintiff, seeking a specific performance There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a Court of Equity ought not to enforce a contract, where there is a mistake, against the defendant, insisting upon, and establishing the mistake, for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why Equity should interfere at the instance of the party, as plaintiff, and cancel it, and if the mistake is partial only, why at his instance it should reform it In these cases, the remedial justice is equal, and the parol evidence to establish it is equally open to both parties to use as proof Why should not the party, aggrieved by a mistake in an agreement, have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol evidence be equally admissible to establish a mistake, as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party. Mr Chancellor Kent has forcibly observed, "That it cannot make any difference in the reasonableness and justice of the remedy, whether the mistake was to the prejudice of one party or the other If the Court has a competent jurisdiction to correct such mistakes, (and that is a point understood and settled,) the agreement, when corrected, and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement, perfect in the first instance. It ought to have the same efficacy, and be entitled to the same protection. when made accurate under the decree of the Court, as when made accurate by the act of the parties Res ascendent lumina rebus" Keisselbrack *v.* Livingston, 4 Johns. Ch. R. 148, 149 [Keisselback *v* Livingston, has been sometimes doubted, and in 2 Eq Lead. Cases, 552, it is said that the only way of reconciling it with principle is to look at the case, as it would have been, had the question arisen on a bill filed

from the nature of the transaction,[1] that it was so intended by the parties, and was omitted by want of skill or by mistake.[2] The debt being joint, the natural, if not the irresistible, inference in such cases is, that it is intended by all the parties, that in every event the responsibility should attach to each obligor, and to all equally. This can be done only by making the bond several as well as joint; for otherwise, in case of the death of one of the obligors, the survivor or survivors only would be liable at law for the debt.[3] Indeed, it seems now well established as a general principle, that

by the tenant to restrain the landlord from enforcing the clause in dispute on the ground of fraud.] It may be added, that, if the doctrine be founded upon the impropriety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff, than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the Statute of Frauds, it would, if not more intelligible, at least have been less inconvenient in practice. But it does not appear to have been thus restricted, although the cases, in which it has been principally relied on, have been of that description. It will often be quite as unconscientious for a defendant to shelter himself under a defence of this sort, against a plaintiff, seeking the specific performance of a contract, and the correction of a mistake, as it will be to enforce a contract against a defendant, which embodies a mistake to his prejudice. See Comyns, Dig. Chancery, 2 C. 4; 2 X. 3; 4 L. 2; Atty.-Gen. *v.* Sitwell, 1 Younge & Coll. R. 583. See Chetwood *v.* Brittan, 1 Green, Ch. R. 438; Jarvis *v.* Palmer, 11 Paige, 460; Robeson *v.* Harwell, 6 Georgia, 589.

[1] See Hyde *v.* Tanner, 1 Barb. 84; Barnes *v.* Camart, Id. 398.

[2] Simpson *v.* Vaughan, 2 Atk. 31, 33; Bishop *v.* Church, 2 Ves. 100, 391; Thomas *v.* Frazer, 3 Ves. 399; Devaynes *v.* Noble, Sleech's case, 1 Meriv. R. 538, 539; Sumner *v.* Powell, 2 Meriv. 30, 35; Howe *v.* Contencin, 1 Bro. Ch. R. 27, 29; Ex parte Kendall, 17 Ves. 519, 520; Underhill *v.* Howard, 10 Ves. 209, 227; Hunt *v.* Rousmaniere, 8 Wheaton, R. 212, 213; S. C. 1 Peters, Sup. C. R. 16; Weaver *v.* Shryork, 6 Serg. & R. 262, 264; Ex parte Symonds, 1 Cox, R. 200; Burn *v.* Burn, 3 Ves. 573, 583; Ex parte Bates & Henckill, 3 Ves. R. 400, note; Gray *v.* Chiswick, 9 Ves. 118.

[3] Weaver *v.* Shryork, 6 Serg. & R. 262, 264; Gray *v.* Chiswick, 9 Ves. 118; Ex parte Kendall, 17 Ves. 525.

every contract for a joint loan is in Equity to be deemed, as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile nature or not; for in every such case it may fairly be presumed to be the intention of the parties, that the creditor should have the several, as well as the joint, security of all the borrowers for the repayment of the debt.[1] Hence, if one of the borrowers should die, the creditor has a right to proceed for immediate relief out of the assets of the deceased party without claiming any relief against the surviving joint contractors, and without showing that the latter are unable to pay by reason of their insolvency.[2]

§ 163. But where the inference of a joint original debt or liability is repelled, a Court of Equity will not interfere; for, in such a case, there is no ground to presume any mistake.[3] This doctrine has been very clearly expounded by Sir William Grant. "When" (says he) "the obligation exists only in virtue of the covenant, its extent can be measured only by the words in which it is conceived." A partnership debt has been treated in Equity as the several debt of each partner, although at law it is only the joint debt of all.[4] But, there, all the partners have had a benefit from the money advanced, or the credit given; and the obligation of all

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[1] Thorpe *v.* Jackson, 2 Younge & Coll. 553; Wilkinson *v.* Henderson, 1 Mylne & Keen, 582. But see Richardson *v.* Horton, 6 Beavan, R. 185.

[2] Ibid. — But in all such cases the surviving partners are properly to be made parties, as they have a right to contest the demand, and are interested in taking the account. Ibid.

[3] See Hunt *v.* Rousmaniere, 8 Wheat. R. 212, 213, 214; S. C. 1 Peters, Sup. C. R. 16. See Richardson *v.* Horton, 6 Beavan, R. 185.

[4] Post, § 676.

to pay exists, independently of any instrument, by which the debt may have been secured. So, where a joint bond has in Equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It is not the bond that first created the liability."[1]

§ 164. It is upon the same ground, that a Court of Equity will not reform a joint bond against a mere surety, so as to make it several against him, upon the presumption of a mistake from the nature of the transaction; but it will require positive proof of an express agreement by him, that it should be several as well as joint.[2] And in other cases, where the obligation or covenant is purely matter of arbitrary convention, not growing out of any antecedent liability in all or any of the obligors or covenantors to do what they have undertaken, (as, for example, a bond or covenant of indemnity for the acts or debts of third persons,) a Court of Equity will not by implication extend the responsibility from that of a joint, to a joint and several, undertaking."[3] But if there be an express agreement to the effect that an obligation or other contract shall be joint and several, or to any other effect, and it is omitted by mistake in the instrument, a Court of Equity will, under such circumstances, grant relief as fully against a surety or guarantee, as against the principal party.[4]

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[1] Sumner *v.* Powell, 2 Meriv. R. 35, 36. See also Underhill *v.* Harwood, 10 Ves. 227; Thorpe *v.* Jackson, 2 Younge & Coll. 553; Ex parte Kendall, 17 Ves. 525; Cowell *v.* Sykes, 2 Russ. R. 191.

[2] Ibid.; Weaver *v.* Shryork, 6 Serg. & R. 262, 264, 265.

[3] Sumner *v.* Powell, 2 Meriv. R. 30, 35, 36; Harrison *v.* Mirge, 2 Wash. R. 136; Ward *v.* Webber, 1 Wash. R. 274; Thomas *v.* Frazer, 3 Ves. 399, 402; Burn *v.* Burn, 3 Ves. 573, 582; Richardson *v.* Horton, 6 Beavan, R. 186.

[4] Ibid.; Wiser *v.* Blachley, 1 John. Ch. R. 607; Crosby *v.* Middleton,

§ 165. In all cases of mistake in written instruments, Courts of Equity will interfere only as between the original parties, or those claiming under them in privity; such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them, with notice of the facts.[1] As against *bonâ fide* purchasers for a valuable consideration without notice, Courts of Equity will grant no relief; because they have, at least, an equal equity to the protection of the Court.[2]

§ 166. In like manner, as Equity will grant relief in cases of mistake in written instruments, to prevent manifest injustice and wrong, and to suppress fraud, it will also grant relief and supply defects where, by mistake, the parties have omitted any acts or circumstances, necessary to give due validity and effect to written instruments. Thus, Equity will supply any defect of circumstances in conveyances, occasioned by mistake; as of livery of seisin in the passing of a freehold; or of a surrender in case of a copyhold, or the like; so also misprisions and omissions in deeds, awards, and other solemn instruments, whereby they are defective at law.[3] [But Equity will not grant relief where

Prec. Ch. 309; S. C. 2 Eq. Abridg. 188 F.; Berg *v.* Radcliffe, 6 Johns. Ch. R. 302, 307, &c.; Rawstone v. Parr, 3 Russell, R. 424; S. C. Id. 539.

[1] Warwick *v.* Warwick, 3 Atk. 293; Com. Dig. Chancery, 2 C. 2; 4 J. 4.

[2] 1 Fonbl. Eq. B. 1, ch. 3, § 7, and notes; Id. ch. 3, § 11, note; Newland on Contracts, 344, 345; Davis *v.* Thomas, Sugden on Vend. ch. 3, p. 143, 159, (7th edit.); Warwick *v.* Warwick, 3 Atk. 290, 293; Malden *v.* Merrill, 2 Atk. 13; West *v.* Erissey, 2 P. Will. 349; Powell *v.* Price, 2 P. Will. 535; Whitman *v.* Weston, 30 Maine, 285; Ante, § 61 *c.* § 108, § 139; Post, § 381, 409, 434, 436.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7; Id. ch. 3, § 1, and the cases there cited;

an agent having no authority under seal, has executed a sealed instrument in the name of his principal.[1]] It will also interfere in cases of mistake in judgments, and other matters of record, injurious to the rights of the party.[2]

§ 167. The same principle applies to cases where an instrument has been delivered up, or cancelled, under a mistake of the party, and in ignorance of the facts material to the rights derived under it. A Court of Equity will in such cases grant relief, upon the ground, that the party is conscientiously entitled to enforce such rights; and that he ought to have the same benefit as if the instrument were in his possession with its entire original validity.[3]

§ 168. And, for the same reason, Equity will give effect to the real intentions of the parties, as gathered from the objects of the instrument, and the circumstances of the case, although the instrument may be drawn up in a very inartificial and untechnical manner. For, however just in general the rule may be, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est*;[4] yet that rule shall not prevail to defeat the manifest intent and object of the parties,

Id. ch 2, § 7, and notes; Grounds and Rud. of the Law, M. 112, p. 81, (edit. 1751); Com. Dig. Chancery, Z; Kekewick, Dig. Chan. Equity, 1; Newland on Contracts, ch. 19, p. 342 to 350; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 367, 368, 369; Id. ch. 4, § 5, p. 489, 490, 494, 495; Thorne v. Thorne, 1 Vern. R. 141; Com. Dig. Chancery, 2 T. 1, to 2 T. 7; 1 Madd. Ch. Pr. 42; Id. 55, 65; Fothergill v. Fothergill, 2 Freeman, R. 256, 257.

[1] Pratt v. McCullough, 1 McLean, 69.

[2] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 5, p. 492; Barnsley v. Powell, 1 Ves. R. 119, 284, 289; Com. Dig. Chancery, 3 W.

[3] East India Co. v. Donald, 9 Ves. 275; East India Co. v. Neave, 5 Ves. 173.

[4] Co. Litt. 147 *a*.

where it is clearly discernible on the face of the instrument, and the ignorance, or blunder, or mistake of the parties has prevented them from expressing it in the appropriate language.[1] Thus, if one in consideration of natural love should execute a feoffment, or a lease and release, or a bargain and sale, it would, notwithstanding the use of the technical words, be held to operate as a covenant to stand seised.[2] And the same rule would be applied, if, under the like circumstances, instead of the words "bargain and sell," the words "give and grant," or "enfeoff, alien, and confirm," should be used in a deed.[3]

§ 169. There is also another marked instance of the application of the remedial authority of Courts of Equity, and that is, in regard to the execution of powers. In no case will Equity interfere where there has been a non-execution of a power, as contradistinguished from a trust;[4] for if a trust be coupled

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[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 367, 368; Smith *v.* Packhurst, 3 Atk. 136; Stapilton *v.* Stapilton, 1 Atk. 8; 1 Fonbl. Eq. B. 1, ch. 6, § 11, 13, and note (*d*); Id. § 16, and note (*e*); Id. § 18, and note (*n*); Alexander *v.* Newton, 2 Gratt. 266.

[2] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, p. 367, 368; Thompson *v.* Attfield, 1 Vern. R. 40; Stapilton *v.* Stapilton, 1 Atk. 8; Thorne *v.* Thorne, 1 Vern. 141; Brown *v.* Jones, 1 Atk. 190, 191.

[3] Jeremy, ibid.; Harrison *v.* Austin, 3 Mod. R. 237. The same point was recognized in Doungsworth *v.* Blair, 1 Keen, R. 795, 801, where the Master of the Rolls said: "An indenture, which is intended to be an indenture of release, but cannot operate as such, may, for the purpose of carrying into effect the intention of the parties, and if there be a proper consideration, be construed as a covenant to stand seised."

[4] See Brown *v.* Higgs, 8 Ves. 570; Holmes *v.* Coghill, 7 Ves. 499; S. C. 12 Ves. 206; Tollett *v.* Tollett, 2 P. Will. 489; 1 White & Tudor's Eq. Lead. Cases, 208 and notes; 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 4, § 25, note (*h*) and (*k*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 376, 377; Sugden on Powers, ch. 6, § 3; Post, § 176, note.

with a power, there (as we shall presently see)[1] the trust will be enforced, notwithstanding the force of the power does not execute it. But, if there be a defective execution, or attempt at execution of a mere power, there Equity will interpose and supply the defect, not universally, indeed, but in favor of parties for whom the person intrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. Thus, such a defective execution will be aided in favor of persons standing upon a valuable or a meritorious consideration; such as a *bonâ fide* purchaser for a valuable consideration, a creditor, a wife, and a legitimate child;[2] unless, indeed, such aid of the defective execution would, under all the circumstances, be inequitable to other persons; or it is repelled by some counter equity.[3] Indeed, if a general power to raise money for any purposes be given, so that the donee of the power may, if he choose, execute it in his own favor, and he should execute it in favor of mere volunteers, there a Court of Equity will, in favor of creditors, deem the money assets against the volunteers, upon the ground that the donee of the power has an absolute dominion over the power and the property.[4]

§ 170. The reason for this distinction, between the non-execution of a power and the defective execution

[1] Post, § 176, and note; Burrough *v.* Philcox, 5 Mylne & Craig, 73, 92.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); [illegible], 4, § 25, and notes (*h*), (*i*), (*m*); Id. ch. 5, § 2, and notes; Fothergill *v.* Fothergill, 2 Freem. R. 256, 257; Com. Dig. Chan. 4 H. 1, to 4 H. 4; 4 H. 6; Gilbert, Lex Pretoria, p. 300 to 306; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 372.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7, and note (*v*).

[4] Post, § 176, and note.

of it, has been stated with great clearness and precision by a learned judge. "The difference," (he said,) "is betwixt a non-execution and a defective execution of a power. The latter will always be aided in Equity under the circumstances mentioned; it being the duty of every man to pay his debts, and of a husband or father to provide for his wife or child. But this Court will not help the non-execution of a power, which is left to the free will and election of the party, whether to execute or not; for which reason Equity will not say, he shall execute it; or do that for him, which he does not think fit to do for himself." [1] Indeed, a Court

[1] The Master of the Rolls, in Tollet *v.* Tollet, 2 P. Will. 490. See also Lassells *v.* Cornwallis, 2 Vern. 465; Crossling *v.* Crossling, 2 Cox, R. 396; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and notes; Id. ch. 1, § 7, and notes; Sugden on Powers, ch. 6, § 3, p. 315. — Sir William Grant, in Holmes *v.* Coghill, (7 Ves. 506,) and Lord Erskine, in the same case on appeal, (12 Ves. 212,) have expressed dissatisfaction with this distinction, as not quite consistent with the principles of Law or Equity, though fully established by authority. The former, in reasoning on the case of a power to charge an estate with £2,000, by deed, or will, which had not been executed, and of which creditors sought the benefit, as if executed, said: "To say, that, without a deed or will, this sum shall be raised, is to subject the owner of the estate to a charge in a case in which he never consented to bear it. The chance, that it may never be executed, or that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement; and which no one has a right to take from him. In this respect, there is no difference between a non-execution and a defective execution of a power. By the compact the estate ought not to be charged in either case. It is difficult, therefore, to discover a sound principle for the authority this Court assumes, for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed, wherever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed?

of Equity, by acting otherwise in the case of a non-execution of a power, would, in effect, deprive the party of all discretion, as to the exercise of it; and would thus overthrow the very intention manifested by the parties in the creation of the power. On the contrary, when the party undertakes to execute a power,

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He is an absolute stranger to the Equity between the possessor of the power and the party in whose favor it is intended to be executed. As against the debtor, it is right that he should pay. But what Equity is there for the creditor to have the money raised out of the estate of a third person, in a case in which it was never agreed that it should be raised? The owner is not heard to say, it will be a grievous burthen, and of no merit or utility. He is told the case provided for exists; it is formally right; he has nothing to do with the purpose. But upon a defect, which this Court is called upon to supply, he is not permitted to retort this argument; and to say, it is not formally right; the case provided for does not exist: and he has nothing to do with the purpose. In the sort of Equity upon this subject there is some want of equality. But the rule is perfectly settled; and, though perhaps with some violation of principle, with no practical inconvenience."

There is much strength in this reasoning; but, after all, it is open to some question. The party, possessing the power, intends to execute it; he proceeds to do an act which he supposes to be a perfect act of execution. He possesses the right to do it in a formal manner; he has failed, by mistake, against his intention. But the objects, in whose favor it is to be executed, possess a high, moral, and equitable claim for its execution. Under such circumstances, why should a mere mistake, contrary to the intention, defeat the bounty, or the justice of the possessor of the power? If the case were one of an absolute property in the party, a Court of Equity would not fail to correct the mistake in favor of persons having such merits. Why should it hesitate, when the possessor of the power has done an act, intended to reduce it to the case of absolute property? There is no countervailing Equity in such a case in favor of the other side. The case stands dryly upon a mere point of strict law. The difficulty in the argument is, that it deals with the power as a mere naked authority to act, without considering, that when the party elects to act, an interest attaches to him in the execution of the power; and, that the election thus made is defeated, and the interest thus created fails, by mere mistake, from the defective execution, against parties standing on a strong Equity, and in favor of others having none. See 1 Fonbl. Eq. B. 1, ch. 4, § 25.

but, by mistake, does it imperfectly, Equity will interpose to carry his very intention into effect, and that too, in aid of those who are peculiarly within its protective favor, that is, creditors, purchasers, wives, and children.[1]

§ 171. What shall constitute an execution, or preparatory steps or attempts towards the execution of a power, entitling the party to relief in Equity, on the ground of a defective execution, has been largely and liberally interpreted. It is clear that it is not sufficient that there should be a mere floating and indefinite intention to execute the power, without some steps taken to give it a legal effect.[2] Some steps must be taken, or some acts done, with this sole and definite intention, and be such as are properly referrible to the power.[3] Lord Mansfield, at one time, contended, that whatever is an equitable, ought to be deemed a legal, execution of a power, because there should be a uniform rule of property; and that, if Courts of Equity would presume that a strict adherence to the precise form, pointed out in the creation of the power, was not intended, and therefore not necessary, the same rule should prevail at law.[4] But

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[1] Moody *v.* Reid, 1 Madd. R. 516; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, pp. 369, 370, 371, 372, 375; Darlington *v.* Pulteney, Cowp. 266, 267; Ellis *v.* Nimmo, Lloyd & Gould's Rep. 348. — There seems a distinction in this respect between cases of the defective execution of powers, and cases of voluntary contracts, covenants, and settlements, of which specific performance is sought. See Jeffreys *v.* Jeffreys, 1 Craig & Phillips, 138, 141; Post, § 433, note; 706, 706 *a*, 787, 793 *b*, 973, 987, 1040 *b*.

[2] See 2 Chance on Powers, ch. 23, § 3, art. 3005, 3011; Barr *v.* Hatch, 3 Ohio, 527.

[3] See Sugden on Powers, ch. 6, § 2.

[4] Darlington *v.* Pulteney, Cowper, R. 267.

this doctrine has been overruled. And, indeed, Courts of Equity do not deem the power well executed unless the form is adhered to; but in cases of a meritorious consideration they supply the defect.[1]

§ 172. And relief will be granted, not only when the defect arises from an informal instrument, not within the scope of the power, but also when the defect arises from the improper execution of the appropriate instrument. All that is necessary is, that the intention to execute the power should clearly appear in writing. Thus, if the donee of a power merely covenant to execute it; or, by his will, desire the remainder-man to create the estate; or enter into a contract, not under seal, to execute the power; or by letters promise to grant an estate, which he can execute only by the instrumentality of the power; in all these, and the like cases, Equity will supply the defect.[2] And even an answer to a bill in Equity, stating that the party does appoint, and intends by a writing in due form to appoint the fund, will be an execution of the power for this purpose.[3]

§ 173. The like rule prevails, where the instrument selected is not that prescribed by the power; provided it is not in its own nature repugnant to the true object of the creation of the power. Thus, if the power ought to be executed by a deed, but it is executed by a will, the defective execution will be aided.[4] But, if the

[1] Sugden on Powers, ch. 6, § 1, p. 344; Id. § 359; Id. 361 to 370.

[2] Ibid.

[3] Carter *v.* Carter, Mosely, R. 365.

[4] Smith *v.* Ashton, 1 Freeman, R. 308; S. C. 1 Ch. Cas. 269; Sugden on Powers, ch. 6, (4th edit.) p. 362 to 367; Follett *v.* Follett, 2 P. Will. 489; 2 Chance on Powers, ch. 23, § 1, pp. 507, 508; Id. 513 to 516; Com. Dig. Chancery, 4 H. 6.

power ought to be executed by a will, and the donee of the power should execute a conveyance of the estate by an absolute deed, it will be invalid; because such a conveyance, if it avail to any purpose, must avail to the immediate destruction of the power, since it would no longer be revocable, as a will would be. The intention of the power, in its creation, was to reserve an entire control over its execution, until the moment of the death of the donee; and this intention would be defeated by any other instrument than a will.[1] An act done, not strictly according to the terms of the power, but consistent with its intent, may be upheld in Equity. But an act, which violates the very purpose for which the power was created, and the very control over it, which it meant to vest in the donee, is repugnant to it, and cannot be deemed, in any just sense, to be an execution of it.[2]

§ 174. But in other respects there is no difference between a defective execution of a power by a will and by a deed; for in each case the remedial interposition of Equity will be applied. Thus, if a power is required to be executed in the presence of three witnesses, and it is executed in the presence of two only, Equity will interfere in such a case. So, if the instrument, whether it be a deed or a will, is required to be signed and sealed, and it is without seal or signature, Equity will relieve.[3] [But Equity will not relieve in case of a deed given by an attorney, who had, however, no power under seal; for this is the case of a defective power, and not

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[1] Reid *v.* Shergold, 10 Ves. R. 378, 380.

[2] See Bainbridge *v.* Smith, 8 Sim. R. 86; Ante, § 97.

[3] Sugden on Powers, ch 6, (4th edit.) p. 369, 370; 2 Chance on Powers, ch. 23, p. 507 to 510; Wade *v.* Paget, 1 Bro. Ch. R. 363.

of defective execution of power.[1]] And where a power is required to be executed by a will by way of appointment, there the appointment will be aided, although the will is not duly executed according to the Statute of Frauds; for it takes effect, not under the will, but under the instrument creating the power.[2] Equity will also, in many cases, grant relief, where, by mistake, a different kind of estate or interest is given from that which is authorized by the power, or where there is an excess of the power.[3]

§ 175. In all these cases it is to be understood that the intention and objects of the power are not defeated or put aside; but that they are only attempted by the party to be carried formally into effect. But where there is a defect of substance in the execution of the

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[1] Piatt *v.* McCullough, 1 McLean, 69. See Thorp *v.* McCallum, 1 Gilm. 615.

[2] Wilkes *v.* Holmes, 9 Mod. 487, 488; Shannon *v.* Bradstreet, 1 Sch. & Lefr. 60; Sugden on Powers, ch. 6, (4th edit.) p. 362 to 367; 2 Chance on Powers, ch. 23, §1, p. 507, 508. But see Gilb. Lex Pretoria, p. 301; Duff *v.* Dalzell, 1 Bro. Ch. R. 147; Wagstaff *v.* Wagstaff, 2 P. Will. 259, 260; Longford *v.* Eyre, 1 P. Will. 741; Com. Dig. Chancery, 4 H. 7. Where an attempt is made to execute a power by a will (the power authorizing an execution by will) and the will is left imperfect, the same reason does not seem to exist, as may in other cases, to carry it into effect; for it may have been thus left intentionally imperfect, from a change of purpose. Lord Eldon, in remarking upon the difficulties of some of the cases, has said: — "If, in the instance of a want of a surrender of copyhold estate, the circumstance of the devise being to a child is considered, the more natural conclusion is, that the testator, whatever his purpose was, going only so far towards it, and not proceeding to make it effectual, had dropped it. So the attempt to execute a power is no more than an intimation that the party means to execute it. But if all the requisite ceremonies have not been complied with, it cannot be supposed that the intention continued until his death." Finch *v.* Finch, 15 Ves. 51.

[3] Sugden on Powers, ch. 6, § 1, art. 2; Id. ch. 9, § 8, art 2; 2 Chance on Powers, ch. 23, § 7, p. 610, 613; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 373, 374.

power, such as the want of coöperation of all the proper parties in the act, there Equity will not aid the defect.[1]

§ 176. But in all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief must stand upon some Equity, superior to that of the party against whom he asks it. If the equities are equal, a Court of Equity is silent and passive.[2] Thus, Equity will not relieve one person, claiming under a voluntary defective conveyance, against another, claiming also under a voluntary conveyance; but will leave the parties to their rights at law.[3] For, regularly, Equity is

[1] See 2 Chance on Powers, ch. 23, § 2, p. 540 to 543; Com. Dig. Chancery, 4 H. 7.

[2] See Sugden on Powers, ch. 6, (4th edit.) p. 353, 358; 2 Chance on Powers, ch. 23, § 1, p. 502, 504, 507.

[3] 1 Fonb. Eq. B. 1, ch. 1, § 7, and notes; Id. ch. 4, § 25, and notes; Id. ch. 5, § 2, and notes; Goodwin *v.* Goodwin, 1 Rep. Chan. 92 [173]; Mitf. Eq. Pl. by Jeremy, 274; Moody *v.* Reid, 1 Madd. R. 516; 1 Madd. Eq. Pr. 45, 46, 47; Sugden on Powers, ch. 6, (4th edit.) p. 353 to 358; 2 Chance on Powers, ch. 23, § 1, p. 502, 504, 507; Com. Dig. Chancery, 4 H. 7, 4 H. 9, 2 T. 9, 2 T. 10, 2 C. 8, 4 O. 7; Post, § 433, 706 *a*, 787, 793 *a*, 793 *b*, 973, 987. There is one peculiarity as to the execution of powers, which may be here taken notice of, although, for obvious reasons, this is not the place to discuss the nature and effects of powers generally. It is this: If a party possesses a general power to raise money for any purposes, so that, if he pleases, he may execute it in his own favor, and he executes it in favor of mere volunteers; in such a case, it will be deemed assets in favor of creditors, upon the ground of his absolute dominion over the power. But if he does not execute the power at all, there, Equity will not deem it assets. 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*c*); Id. § 25, note (*n*); Harrington *v.* Harte, 1 Cox, R. 131; Townsend *v.* Windham, 2 Ves. 1; Troughton *v.* Troughton, 3 Atk. 656; Lassels *v.* Cornwallis, 2 Vern. 465; George *v.* Milbank, 9 Ves. 189; Holloway *v.* Millard, 1 Madd. R. 414, 419, 420; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 2, p. 376, 377. The distinction is a nice one, and not very satisfactory. Why, when the party executes a power in favor of others, and not of himself, a Court of Equity should defeat his intention, although within the scope of the power, and should execute something beside that intention and

remedial to those only who come in upon an actual consideration; and, therefore, there should be some consideration, equitable or otherwise, express or implied.[1] But there are excepted cases, even from this rule, for a defective execution has been aided in favor of a volunteer, where a strict compliance with the power has been impossible from circumstances beyond the control of the party; as where the prescribed witnesses could not be found; or where an interested party, having possession of the deed, creating the power, has kept it from the sight of the party, executing the power, so that he could not ascertain the formalities required.[2]

§ 177. For the same reason Equity will not supply a surrender, or aid the defective execution of a power, to the disinheritance of the heir at law. Neither will it supply such a surrender in favor of creditors, where there are, otherwise, assets sufficient to pay their debts;[3] nor against a purchaser for a valuable consideration without notice.[4] And there are other cases of the de-

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contrary to it, is not very intelligible. If it be said that he ought to be just before he is generous, that addresses itself merely to his sense of morals. The power enabled him to give, either to himself, or to his creditors, or to mere voluntary donees. Why should a Court of Equity restrict this right of election, if *bonâ fide* exercised? Is not this to create rights, not given by law, rather than to enforce rights secured by law? If the power was *bonâ fide* created, why should a Court of Equity interpose to change its objects or its operations? See Sugden on Powers, ch. 6, § 3.

[1] 1 Fonbl. Eq. B. 1, ch. 5, § 2, and the cases there cited, note (*h*); 1 Madd. Eq. Pr. 44, 45; Sugden on Powers, ch. 6, § 1. See Ellis *v.* Nimmo, Lloyd & Goold's Rep. 333; Fortescue *v.* Barnett, 3 Mylne & Keen, 36, 42, 43; Post, § 372.

[2] Fonbl. Eq. B. 1, ch. 5, § 2, and note (*h*); Gilbert Lex Pretoria, p. 305, 306.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 4, § 25, note (*c*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 369, 370, 371.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*v*); Id. ch. 4, § 25, and note (*f*); Id. B. 6, ch. 3, § 3. But see Id. B. 1, ch. 1, § 7, note (*t*.)

fective execution of powers, where Equity will not interfere; as, for instance, in regard to powers which are in their own nature statutable, where Equity must follow the law, be the consideration ever so meritorious. Thus, the power of a tenant in tail to make leases under a statute, if not executed in the requisite form, prescribed by the statute, will not be made available in Equity, however meritorious the consideration may be.[1] And indeed it may be stated as generally, although not universally, true, that the remedial power of Courts of Equity does not extend to the supplying of any circumstance, for the want of which the Legislature has declared the instrument void; for, otherwise, Equity would, in effect, defeat the very policy of the legislative enactments.[2]

§ 178. Upon one or both of these grounds, to wit, that there is no superior Equity, or that it is against the policy of the law, the remedial power of Courts of Equity does not extend to the case of a defective fine, as against the issue, or of a defective recovery, as against a remainder-man;[3] unless, indeed, there is some-

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[1] Darlington *v.* Pulteney, Cowp. R. 267; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*l.*) But see 2 Chance on Powers, ch. 23, § 2, p. 541 to 545. See Gilbert, Lex Pretoria, p. 304, 305, the difference of a power created by the parties. See also, 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*l.*)

[2] Ante, § 96; 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*i*); Hibbert *v.* Rolleston, 3 Bro. Ch. R. 571, and Mr. Belt's note, ibid; Ex parte Bulteel, 2 Cox, R. 243; Duke of Bolton *v.* Williams, 2 Ves. jr. 138; Curtis *v.* Perry, 6 Ves. R. 739, 745, 746, 747; Mestaer *v.* Gillespie, 11 Ves. 621, 624, 625; Dixon *v.* Ewart, 3 Meriv. R. 321, 332; Thompson *v.* Leake, 1 Madd. R. 39; Thompson *v.* Smith, 1 Madd. R. 395; Bright *v.* Boyd, 1 Story, R. 478. Quære how it would be where a due execution was prevented by fraud, accident, or mistake. See 11 Ves. 625; 1 Madd. 39; Id. 395.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*u*); Id. ch. 5, § 2, and note (*h*).

thing in the transaction to effect the conscience of the issue, or the remainder-man.[1]

§ 179. In regard to mistakes in wills, there is no doubt, that Courts of Equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the Statute of Frauds, which requires wills to be in writing, (whatever may have been the case before the statute,)[2] parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity.[3]

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 25, note (*k*); Id. 15; Com. Dig. Chancery, 2 T. 4, and 2 T. 8, 2 T. 10, 3 N. 2.

[2] Lord Hardwicke, in Milner *v.* Milner, (1 Ves. R. 106,) remarked, that in the early ecclesiastical law, in accordance with the civil law, it was held that errors in legacies might be corrected by the intention of the testator, contrary to his words; and he cited Swinburne on Wills, p. 7, ch. 5, § 13, and Godolphin, p. 3, 477, and the text of the civil law, and the Commentary of Cujacius on the Digest, Lib. 30, tit. 1, l. 15; Cujacii Opera, (edit. 1758), tom. 7. Comment. ad. id. Leg. p. 993, 994. He then added: "Indeed, at the time some of these books were written, the Statute of Frauds had not taken place; and as the law [was] then held, parol evidence might be given in all Courts to explain a will. And perhaps some contrariety of opinions may have been on this subject, where the intention appears on the face of the will, and where not; almost all the authorities in the civil law agreeing in the first case, that the intention shall prevail against the words. But some have thought otherwise in the latter case, where the intention appeared, not on the face of the will, but only by matter *dehors;* although the better opinion even there is, that the intention shall prevail. However, that difficulty cannot be here, as the intention appears on the face of the will."

[3] Milner *v.* Milner, 1 Ves. R. 106; Ulrich *v.* Litchfield, 2 Atk. 373; Hampshire *v.* Peirce, 2 Ves. R. 216; Bradwin *v.* Harper, Ambler, R. 374; Stebbing *v.* Walkley, 2 Bro. Ch. R. 85; S. C. 1 Cox, R. 250;

§ 180. But the mistake, in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will.[1] Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in Equity.[2] So, if there is a mistake in the name, or description, or number, of the legatees, intended to take,[3] or in the property intended to be bequeathed,[4] Equity will correct it.

§ 181. But in each of these cases, the mistake must be clearly made out; for if it is left doubtful, Equity will not interfere.[5] And so, if the words of the bequest are plain, evidence of a different intention, is inadmissible to establish a mistake.[6] Neither will Equity rectify a mistake if it does not appear what the testator would have done in the case, if there had been no mistake.[7]

§ 182. The same principle applies, where a legacy is revoked, or is given upon a manifest mistake of facts. Thus, if a testator revokes legacies to A and B giving

Danvers *v.* Manning, 2 Bro. Ch. R. 18; S. C. 1 Cox, R. 203; Campbell *v.* French, 3 Ves. 321; 1 Fonbl. Eq. B. 1, ch. 11, § 7, note (*v*); 1 Madd. Ch. Pr. 66, 67.

[1] Mellish *v.* Mellish, 4 Ves. 49; Phillips *v.* Chamberlain, Id. 51, 57; Del Mare *v.* Rebello, 3 Bro. Ch. R. 446; Purse *v.* Snaplin, 1 Atk. R. 415; Holmes *v.* Custance, 12 Ves. 279.

[2] Milner *v.* Milner, 1 Ves. R. 106; Danvers *v.* Manning, 2 Bro. Ch. R. 18; Door *v.* Geary, 1 Ves. R. 255, 256; Giles *v.* Giles, 1 Keen, 692.

[3] Stebbing *v.* Walkley, 2 Bro. Ch. R. 85; Rivers's case, 1 Atk. R. 410; Parsons *v.* Parsons, 1 Ves. jr. R. 266; Beemont *v.* Fell, 2 P. Will. 141; Hampshire *v.* Peirce, 2 Ves. 216; Bradwin *v.* Harper, Ambler, R. 374.

[4] Selwood *v.* Mildmay, 3 Ves. 306; Door *v.* Geary, 1 Ves. 250.

[5] Holmes *v.* Custance, 12 Ves. 279.

[6] Chambers *v.* Minchin, 4 Ves. R. 676. But, see Tonnereau *v.* Poyntz, 1 Bro. Ch. R. 472, 480; Powell *v.* Mouchett, 6 Madd. R. 216; Smith *v.* Streatfield, 1 Meriv. R. 358.

[7] See Smith *v.* Maitland, 1 Ves. 363.

as a reason, that they are dead; and they are, in fact, living, Equity will hold the revocation invalid, and decree the legacies.[1] So, if a woman gives a legacy to a man, describing him as her husband, and in point of fact the marriage is void, he having a former wife then living, the bequest will, in Equity, be decreed void.[2]

§ 182. *a.* But though it is clear, that a legacy, given to a person, in a character, which the legatee does not fill, and by the fraudulent assumption of which character the testator has been deceived, will not take effect; yet if the testator is not deceived, although a false character is in fact assumed, the legacy will be good. *A fortiori*, it will be good, if both parties, not only know the actual facts, but are designedly parties to the assumption of the false character. Thus, where the testator and the legatee A. G. were married, both knowing, at the time, that the legatee had a prior husband alive; and afterwards the testator gave all the residue of his estate to the legatee, describing her as his wife A. G., it was held that the legacy was good; for as both parties had a guilty knowledge of the facts, no fraud was committed on the testator. And it was then said, that however criminal the conduct of the parties might be, it was no part of the duty of Courts of Equity to punish parties for immoral conduct by depriving them of their civil rights.[3]

§ 183. But a false reason given for a legacy, or for the revocation of a legacy, is not always a sufficient ground to avoid the act or bequest in Equity. To have such an effect, it must be clear, that no other motive

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[1] Campbell *v.* French, 3 Ves. 321.
[2] Kennell *v.* Abbott, 4 Ves. R. 808.
[3] Giles *v.* Giles, 1 Keen, R. 685, 692, 693.

mingled in the legacy, and that it constituted the substantial ground of the act or bequest.[1] The Civil Law seems to have proceeded upon the same ground. The Digest[2] says, *falsam causam legato non obesse, verius est; quia ratio legandi legato non cohæret. Sed plerumque doli exceptio locum habebit, si probetus, alias legaturus non fuisse.* The meaning of this passage is, that a false reason given for the legacy is not of itself sufficient to destroy it. But there must be an exception of any fraud practised, from which it may be presumed, that the person giving the legacy would not, if that fraud had been known to him, have given it.[3] And the same reasoning applies to a case of clear mistake.

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[1] Kennell *v.* Abbott, 4 Ves. R. 802.

[2] Dig. Lib. 35, tit. 1, l. 72, § 6. See also Swinburne on Wills, Pt. 7, § 22, p. 557.

[3] Kennell *v.* Abbott, 4 Ves. 808.

CHAPTER VI.

ACTUAL OR POSITIVE FRAUD.

§ 184. LET us now pass to another great head of concurrent jurisdiction in Equity, that of Fraud. And here it may be laid down as a general rule, subject to few exceptions, that Courts of Equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, other Courts.[1] It has been already stated, that in a

[1] Barker *v.* Ray, 2 Russ. R. 63; Post, § 238, 252, 264, 440. — Mr. Fonblanque in his note (B. 1, ch. 2, § 3, note *u*,) says: "Whether Courts of Equity could interpose, and relieve against fraud practised in the obtaining of a will, appears to have been formerly a point of considerable doubt. In some cases we find the court of chancery distinctly asserting its jurisdiction; as in Maundy *v.* Maundy, 1 Ch. Rep. 66; Well *v.* Thornagh, Pre. Ch. 123; Goss *v.* Tracy, 1 P. Wms. 287; 2 Vern. 700; in other cases disclaiming such jurisdiction, though the fraud was gross and palpable; as in Roberts *v.* Wynne, 1 Ch. Rep. 125; Archer *v.* Moss, 2 Vern. 8; Herbert *v.* Lownes, 1 Ch. Rep. 13; Thynn *v.* Thynn, 1 Vern. 296; Devenish *v.* Barnes, Prec. Ch. 3; Barnesley *v.* Powell, 1 Ves. 287; Marriott *v.* Marriott, Str. 666. That an action at law will lie upon a promise, that if the devisor would not charge the land with a rent charge, the devisee would pay a certain sum to the intended legatee of the rent; see Rockwood *v.* Rockwood, 1 Leon. 192; Cro. Eliz. 163. See also Dutton *v.* Poole, 1 Vent. 318, 332; Beringer *v.* Beringer, 16 June, 26 Car. II.; Chamberlain *v.* Chamberlain, 2 Freem. 34; Leicester *v.* Foxcroft, cited Gilb. Rep. 11; Reech *v.* Kenningall, 26 October, 1748. But since the cases of Kenrich *v.* Bransby, 3 Brown's P. C. 358, and Webb *v.* Cleverden, 2 Atk. 424, it appears to have been settled, that a will cannot be set aside in equity for fraud and imposition, because a will of personal estate may be set aside for fraud in the Ecclesiastical Court, and a will of real estate may be set aside at law; for in such cases as the animus testandi is wanting, it cannot be considered as a will. Bennett *v.* Vade, 2 Atk. 324; Anon. 3 Atk. 17. Though Equity will not set aside a will for fraud, nor

great variety of cases fraud is remediable, and effectually remediable at law.[1] Nay, in certain cases, such

restrain the probate of it in the proper court, yet if the fraud be proved it will not assist the party practising it, but will leave him to make what advantage he can of it. Nelson *v.* Oldfield, 2 Vern. 76. But if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the prerogative court to controvert its validity. Sheffield *v.* Duchess of Buckingham, 1 Atk. 628. Lord Hardwicke, having admitted that a court of equity cannot set aside a will for fraud, observes, in the above case of Sheffield *v.* Duchess of Buckingham, that 'the admission of a fact by a party concerned, and who is most likely to know it, is stronger than if determined by a jury; and facts are as properly concluded by an admission, as by a trial.' That the party prejudiced by the fraud may file a bill for a discovery of all its circumstances, is unquestionable. Supposing, then, the defendant to admit the fraud, if the admission is to have the effect ascribed to it by Lord Hardwicke, it still remains to be determined how a court of equity ought to proceed. If it could not relieve, it would follow, as a consequence, that so much of the bill as seeks relief would be demurrable; but the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving such relief." But the question, whether a Court of Equity will interpose and grant relief in cases of wills obtained or suppressed by fraud, has been much litigated since the note of Mr. Fonblanque was written, and it is now well settled, that a Court of Equity will not entertain jurisdiction to set aside a will obtained by fraud, or establish a will suppressed by fraud, whatever relief it may otherwise grant under special circumstances. See Allen *v.* Macpherson, 5 Beav. R. 469; S. C. on appeal, 1 Phillips, Ch. R. 133. In this case, upon the appeal, Lord Cottenham discussed the authorities at large, and said: "The testator in this case had bequeathed a considerable property to the plaintiff by his will and subsequent codicils. He afterwards, by a further codicil (the ninth,) revoked these bequests, and in lieu of them made a small pecuniary provision in his favor. It was alleged by the bill that this alteration was procured by false and fraudulent representations made by an illegitimate son of the testator, and by the defendant Susannah Evans, his daughter, as to the character and conduct of the plaintiff, Susannah Evans being the residuary legatee. To this bill the defendants demurred. The Master of the Rolls overruled the demurrer, and from

[1] Ante, § 59, 60; 3 Black. Comm. 431; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*); 4 Inst. 84; Bright *v.* Eynor, 1 Burr. R. 396; Jackson *v.* Burgott, 10 Johns. R. 457, 462.

as fraud in obtaining a will, whether of personal estate, or real estate, the proper remedy is exclusively vested

this judgment the defendants have appealed. The question is one of considerable importance. The same objection of fraud, founded upon the same facts, was made in the Ecclesiastical Court upon the application for probate. It did not, however, prevail. This, then, is, in substance, an attempt to review the proceedings in that Court; for a sufficient case of imposition and fraud practised on the testator would have been a ground for refusing the probate. There are, undoubtedly, cases, where fraud being proved, this Court has declared the party committing the fraud a trustee for the person against whom the fraud was practised; but none of these cases appear to me to go so far as the present. The case of Seagrave *v.* Kirwan has no very close application to the question now before the Court. The Chancellor of Ireland, Sir Anthony Hart, declared the executor a trustee, as to the residue, for the next of kin. But in that case the testator never intended that the executor should take any benefit under the will. The rule, which then prevailed, that the executor was entitled to the residue, unless otherwise disposed of, except where a legacy was bequeathed to him by the will, was a rule of interpretation or construction. The learned judge considered that it was the duty of the executor who prepared the will, and who was a gentleman of the bar, to have informed the testator that such was the rule. He was not allowed to profit from this omission, and was therefore decreed to be a trustee for the next of kin. The Ecclesiastical Court had no authority to order this. They had no power to do what the justice of the case required. So, in Kennell *v.* Abbott, (4 Ves. 802.) There, a fraud had been practised, and the question was one of intention. The testatrix intended the legacy for her husband. The legatee had fraudulently assumed that character. The Master of the Rolls, Sir Pepper Arden, came to the conclusion that the character he had so assumed was the only motive for the gift. The law, therefore, he said, would not permit him to avail himself of the testatrix's bounty. In the case of Marriot *v.* Marriot, which is mentioned in Strange (p. 666,) and also in Chief Baron Gilbert's Reports (p. 203; see p. 209,) it does not appear what was the nature of the imputed fraud. The cause was compromised, and the judgment, according to the report in Gilbert, was written by the learned judge, but not delivered. He says that a court of equity may, according to the real intention of the testator, declare a trust upon a will, although it be not contained in the will itself, in these three cases. First, in the case of a notorious fraud upon a legatee; as if the drawer of a will should insert his own name instead of the name of the legatee, no doubt he would be a trustee for the real legatee. Secondly, where the words imply a trust for the relations, as in the case of a specific devise to the executors, and

ther Courts; in wills of personal estate in the Ecclesiastical Courts;[1] and in wills of real estates in

no disposition of the residue. Thirdly, in the case of a legatee promising the testator to stand as a trustee for another. And nobody, he adds, has thought that declaring a trust in these cases is an infringement upon the ecclesiastical jurisdiction. These are the only positions laid down in the intended judgment, which are applicable to the present question. They do not admit of dispute, but are very distinguishable from the case now under consideration. It is sufficient to observe that in none of these instances would the Ecclesiastical Court be competent to afford relief. The same remarks will apply to the case, also, of Kennell *v.* Abbott, which I have already mentioned. But in Plume *v.* Beale (1 P. Wms. 188,) where a legacy was introduced by forgery, Lord Chancellor Cowper refused to interfere, saying it might have been proved in the Ecclesiastical Court, with a particular reservation as to that legacy. There the interference of the court of equity was unnecessary. The question might have been settled by the Ecclesiastical Court. In the case of Barnsley *v.* Powell (1 Ves. sen. p. 284,) Lord Hardwicke says, that fraud in making or obtaining a will must be inquired into and determined by the Ecclesiastical Court, but that fraud in procuring a will to be established in that Court — fraud, not upon the testator, but upon the person disinherited thereby, might be the subject of inquiry in this Court. Fraud, he says, in obtaining the will, infects the whole, but the case of a will in which the probate has been obtained by fraud upon the next of kin, is of another consideration; and Lord Apsley, in the case of Meadows *v.* The Duchess of Kingston (Amb. 762,) recognizes this distinction. But the case which has the closest resemblance to this is Kerrich *v.* Bransby, decided in the House of Lords (7 Bro. P. C. 457.) It was alleged in that case, that the will had been obtained by fraud and imposition practised on the testator; and the Chancellor, Lord Macclesfield, was of that opinion, and pronounced a decree, the effect of which was to deprive the legatee of all benefit under it. It is true, that the prayer of the bill was, that the will might be cancelled; but the decree did not do more than direct the legatee to account for the testator's personal estate, and that what should appear to be in his hands should be paid over to the plaintiff, and that, if necessary, the plaintiff should be at liberty to use the legatee's name to get in the debts or other personal estate of the testator; in substance declaring him a trustee for the plaintiff. But this judgment was reversed on appeal in the House of Lords. It was suggested at the bar, upon the argument in the present

[1] See Gould *v.* Gould, 3 Story, R. 537.

the Courts of Common Law.[1] But there are many cases, in which fraud is utterly irremediable at law;

case, that the decree might perhaps have been reversed on the merits. That, however, has not been the understanding of the profession, and Lord Hardwicke, who probably was acquainted with the history of the case, expressly states in Barnsley *v.* Powel, that it was decided on the question of jurisdiction. Lord Eldon also, in Ex parte Fearon (5 Ves. 633; see p. 647,) observes that it was determined in Kerrich *v.* Bransby, that this Court could not take any cognizance of wills of personal estate, as to matters of fraud. I am of opinion, therefore, as well on authority as on principle, that the demurrer was proper, and ought to have been sustained." Again in Price *v.* Dewhurst, 4 Mylne & Craig, R. 76, 80, 81; Lord Cottenham said: "The first question which occurs is, how can this Court, in administering a testator's property, take any notice of a will of which no probate has been obtained from the Ecclesiastical Court of this country? This Court knows nothing of any will of personalty, except such as the Ecclesiastical Court has, by the probate, adjudged to be the last will." The same question occurred before the Supreme Court of the U. S. in the case of Gaines and wife *v.* Chew and others, 2 Howard, S. Ct. R. 619, 645, 646. In that case, Mr. Justice McLean in delivering the opinion of the Court said: — "In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any very satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal, is the only one that can be given. By art. 1637 of the Civil Code, it is declared that 'no testament can have effect unless it has been presented to the judge,' &c. And in Clappier *et al. v.* Banks, 11 Louis Rep. 593, it is held, that a will alleged to be lost or destroyed, and which has never been proved, cannot be set up as evidence of title, in an action of revendication. In Armstrong *v.* Administrators of Kosciusko, 12 Wheat. 169, this court held, that an action for a legacy could not be sustained under a will which had not been proved in this country before a court of probate, though it may have been effective, as a will, in the foreign country where it was made. In Tarver *v.* Tarver *et al.*, 9 Peters, 180, one of the objects of the

[1] 1 Fonbl. Eq. R. 1, ch. 2, § 3, note (*u*); 3 Black. Comm. 451; Webb *v.* Cleverden, 2 Atk. 424; Kerrich *v.* Bransby, 3 Bro. Parl. Cas. 358; S. C. 7 Bro. Parl. Cas. by Tomlins, p. 437; Bennet *v.* Wade, 2 Atk. 324; Andrews *v.* Pavis, 2 Bro. Parl. Cas. 476; Jeremy Eq. Jurisd. B. 3, Pt. 2, ch. 4, § 5, p. 488, 489; Pemberton *v.* Pemberton. 13 Ves. 297; 1 Hovenden on Frauds, Introd. 17; Cooper, Eq. Pl. 125.

and Courts of Equity, in relieving against it, often go, not only beyond, but even contrary to, the rules

bill being to set aside the probate of a will, the court said, 'the bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal from the Court of Probate, according to the provisions of the law of Alabama.'* The American decisions on this subject have followed the English authorities. And a deliberate consideration of the question leads us to say, that both the general and local law require the will of 1813 to be proved, before any title can be set up under it. But this result does not authorize a negative answer to the second point. We think, under the circumstances, that the complainants are entitled to full and explicit answers from the defendants in regard to the above wills. These answers being obtained may be used as evidence before the Court of Probate to establish the will of 1813 and revoke that of 1811. In order that the complainants may have the means of making, if they shall see fit, a formal application to the Probate Court, for the proof of the last will and the revocation of the first, having the answers of the executors, jurisdiction as to this matter may be sustained. And, indeed, circumstances may arise, on this part of the case, which shall require a more definite and efficient action by the Circuit Court. For if the Probate Court shall refuse to take jurisdiction, from a defect of power to bring the parties before it, lapse of time, or in any other ground, and there shall be no remedy in the higher courts of the state, it may become the duty of the Circuit Court, having the parties before it, to require them to go before the Court of Probates, and consent to the proof of the will of 1713, and the revocation of that of 1811. And should this procedure fail to procure the requisite action on both wills, it will be a matter for grave consideration, whether the inherent powers of a court of chancery may not afford a remedy where the right is clear, by establishing the will of 1813. In the case of Barnesly v. Powell, 1 Ves. sen. 119, 284, 287, above cited, Lord Hardwicke decreed that the defendant should consent, in the Ecclesiastical Court, to the revocation of the will in controversy and the granting of administration, &c. If the emergencies of the case shall require such a course as above indicated, it will not be without the sanction of Louisiana law. The twenty-first article of the Civil Code declares that, 'In civil matters, where there is no express law, the judge is bound to proceed and

* In Trexler v. Miller, 6 Iredell Eq. R. 248, it was held that a Court of Equity has no power to fill up a blank in a will, or to restore a bequest, alleged to have been originally in the will, but fraudulently obliterated before the probate. The Court must take the will as it is certified from the Probate Court.

of law.[1] And, with the exception of wills, as above stated, Courts of Equity may be said to possess a gene-

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decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages where positive law is silent.' This view seemed to be necessary to show on what ground and for what purpose jurisdiction may be exercised in reference to the will of 1813, though it has not been admitted to probate." See also Gengell *v.* Horne, 9 Simons, R. 539, 548; Smith *v.* Spencer, 1 Younge & Coll. N. R. 75; Tucker *v.* Phipps, 3 Atk. R. 360; Tremblestown *v.* Lloyd, 1 Bligh, (N.S.) R. 429; Cann *v.* Cann, 1 P. Will. 723; Dalston *v.* Coatsworth, 1 P. Will. 733; Hampden *v.* Hampden, cited 1 P. Will. 733; S. C. 1 Bro. Parl. Cas. 250; Jones *v.* Jones, 3 Meriv. R. 161; S. C. 7 Price, R. 663; Bennett *v.* Wade, 2 Atk. R. 264; Webb *v.* Claverden, 2 Atk. 424; Mitf. Eq. Pl. by Jeremy, 257, Belt's Supplt. to Vesey, 74, 143; Ridgway *v.* Roberts, 4 Hare, R. 116; Ryves *v.* Duke of Wellington, 9 Beavan, R. 599; Gould *v.* Gould, 3 Story, R. 516. I use the qualified language of the text, though broader language is often used by elementary writers, who assert that Courts of Equity have jurisdiction to relieve against all frauds, except in cases of wills. (See Cooper on Eq. Pl. 125; 1 Hovenden on Frauds, Introd. p. 17.) Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 155, said:—"This Court has an undoubted jurisdiction to relieve against every species of fraud." Yet there are some cases of fraud, in which Equity does not ordinarily grant relief; as in warranties, misrepresentations, and frauds on the sale of personal property; but leaves the parties to their remedy at law. So also in cases of deceitful letters of credit. See Russell *v.* Clark's Ex'rs 7 Cranch, 89. But Lord Eldon has intimated, that in such cases relief might also be had in Equity; Evans *v.* Bicknell, 6 Ves. 182; and Mr. Chancellor Kent has affirmed the same doctrine; Bacon *v.* Bronson, 7 Johns. Ch. 201. In Hardwick *v.* Forbes's Admr's, (1 Bibb, Ky. R. 212,) the Court said:—"It is a well settled rule of law, that wherever a matter respects personal chattels, and lies merely in damages, the remedy is at law only, and for these reasons; 1st. because Courts of law are as adequate as a Court of Chancery, to grant complete and effectual reparation to the party injured; 2d. because the ascertainment of damages is peculiarly the province of a jury." And the Court farther suggested, that the same principle applied to a ratable deduction for fraud in like cases. But that a Court of Equity might properly interfere in such cases, to set aside and vacate the *whole* contract, at the instance of a party injured, in a case of *suppressio veri*, or *suggestio falsi*; not entering into the point of damages. See Waters *v.* Mattinglay, 1 Bibb, R. 244. Blackwell *v.* Oldham, 4 Dana, 195.

[1] 1 Garth *v.* Cotton, 3 Atk. 755; Man *v.* Ward, 2 Atk. 229; Trenchard *v.* Wanley, 2 P. Will. 167.

ral, and perhaps a universal, concurrent jurisdiction with Courts of Law in cases of fraud, cognizable in the latter; and exclusive jurisdiction in cases of fraud beyond the reach of the Courts of Law.[1]

§ 185. The jurisdiction in matters of fraud is probably coeval with the existence of the Court of Chancery; and it is equally probable, that, in the early history of that Court, it was principally exercised in matters of fraud, not remediable at law.[2] Its present active jurisdiction took its rise in a great measure from the abolition of the Court of Star Chamber, in the reign of Charles the First;[3] in which Court the plaintiff was not only relieved, but the defendant was punished for his fraudulent conduct. So that the interposition of Chancery before that period was generally unnecessary.[4]

§ 186. It is not easy to give a definition of fraud in the extensive signification in which that term is used in Courts of Equity; and it has been said, that these Courts have, very wisely, never laid down as a general proposition, what shall constitute fraud,[5] or any general rule, beyond which they will not go upon the ground of fraud, lest other means of avoiding the Equity of the Courts should be found out.[6] Fraud is even more

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1 Colt *v.* Wollaston, 2 P. Will. 156; Stent *v.* Bailis, 2 P. Will. 220, Bright *v.* Eynor, 1 Burr. 396; Chesterfield *v.* Janssen, 2 Ves. 155, Ferson *v.* Sanger, Daveis, 259; Evans *v.* Bicknell, 6 Ves. 132, Warner *v.* Daniels, 1 Wood & Min. 112.

2 4 Inst. 84.

3 Stat. 16 Car. 1, ch. 10.

4 Fonbl. Eq. B. 1, ch. 2, § 12, 1 Madd. Ch. Pr. 89.

5 Mortlock *v.* Buller, 10 Ves. 306.

6 Lawley *v.* Hooper, 3 Atk. 279. — Lord Hardwicke, in his Letter to Lord Kames, of the 30th of June, 1759, (Parke's Hist. of Chan. p 508,) says "As to relief against frauds, no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules, how

odious than force; and Cicero has well remarked; *Cum autem duobus modis, id est, aut vi, aut fraude, fiat injuria; fraus, quasi vulpeculæ, vis, leonis videtur. Utrumque hominis alienissimum; sed fraus odio digna majore.*[1] Pothier says that the term *fraud* is applied to every artifice made use of by one person for the purpose of deceiving another.[2] *On appelle Dol toute espèce d'artifice, dont quelqu'un se sert pour en tromper un autre.*[3] Servius, in the Roman Law, defined it thus: *Dolum malum machinationem quandam alterius decipiendæ causâ, cum aliud simulatur, et aliud agitur.* To this definition Labeo justly took exception, because a party might be circumvented by a thing done without simulation; and, on the other hand, without fraud, one thing might be done, and another thing be pretended. And therefore he defined *Fraud* to be any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. *Dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum, adhibitam.* And this is pronounced in the Digest to be the true definition. *Labeonis Definitio vera est.*[4]

§ 187. This definition is, beyond doubt, sufficiently descriptive of what may be called positive, actual fraud,

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far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive." See also 1 Domat, Civil Law, B. 1, tit. 18, § 3, art. 1.

[1] Cic. de Offic. Lib. 1, ch. 13.

[2] 1 Pothier on Oblig. by Evans. Pt. 1, ch. 1, § 1, art 3, n. 28, p. 19.

[3] Pothier, Traité des. Oblig. Pt. 1, ch. 1, n. 28.

[4] Dig. Lib. 4, tit. 3, l. 1, § 2; Id. Lib. 2, tit. 14, l. 7, § 9. See also 1 Domat, Civ. Law, B. 1, tit. 18, § 3, n. 1. See also 1 Bell, Comm. B. 2, ch. 7, § 2, art. 173; Le Neve *v.* Le Neve, 3 Atk. 654; S. C. 1 Ves. 64; Ambler, 446.

where there is an intention to commit a cheat or deceit upon another to his injury.[1] But it can hardly be said to include the large class of implied or constructive frauds, which are within the remedial jurisdiction of a Court of Equity. Fraud, indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty; trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.[2] And Courts of Equity will not only interfere in cases of fraud to set aside acts done; but they will also, if acts have by fraud been prevented from being done by the parties, interfere, and treat the case exactly as if the acts had been done.[3]

§ 188. Lord Hardwicke, in a celebrated case,[4] after remarking, that a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud, proceeded to give the following enumeration of the different kinds of frauds. First; Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition, which is the plainest case. Secondly; It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept

[1] Mr. Jeremy has defined fraud to be a device, by means of which one party has taken an unconscientious advantage of the other. Jeremy on Eq. Jurisd. B. 3, Pt. 2, p. 358.

[2] See 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*); Chesterfield *v.* Janssen, 2 Ves. 155, 156.

[3] Middleton *v.* Middleton, 1 Jac. & Walk. 96; Lord Waltham's case, cited 11 Ves. 638.

[4] Chesterfield *v.* Janssen, 2 Ves. 155.

on the other; which are inequitable and unconscientious bargains, and of such even the Common Law has taken notice.[1] Thirdly; Fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Court of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience, as to take advantage of his ignorance. Fourthly; Fraud, which may be collected and inferred, in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. Fifthly; Fraud in what are called catching bargains with heirs, reversioners, or expectants, in the life of the parents, which indeed seems to fall under one or more of the preceding heads.

§ 189. Fraud, then, being so various in its nature, and so extensive in its application to human concerns, it would be difficult to enumerate all the instances in which Courts of Equity will grant relief under this head. It will be sufficient, if we here collect some of the more marked classes of cases, in which the principles which regulate the action of Courts of Equity are fully developed, and from which analogies may be drawn to guide us in the investigation of other and novel circumstances.

§ 190. Before, however, proceeding to these subjects, it may be proper to observe, that Courts of Equity do

[1] See James v. Morgan, 1 Lev. 111.

not restrict themselves by the same rigid rules as Courts of Law do, in the investigation of fraud, and in the evidence and proofs required to establish it. It is equally a rule in Courts of Law and Courts of Equity, that fraud is not to be presumed; but it must be established by proofs.[1] Circumstances of mere suspicion, leading to no certain results, will not, in either of these Courts, be deemed a sufficient ground to establish fraud.[2] On the other hand, neither of these Courts insists upon positive and express proofs of fraud; but each deduces them from circumstances affording strong presumptions. But Courts of Equity will act upon circumstances, as presumptions of fraud, where Courts of Law would not deem them satisfactory proofs.[3] In other words, Courts of Equity will grant relief upon the ground of fraud,[1] established by presumptive evidence, which evidence Courts of Law would not always deem sufficient proof to justify a verdict at law. It is in this sense that the remark of Lord Hardwicke is to be understood, when he said, that "fraud may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be *proved*, not *presumed*."[4] And Lord Eldon

[1] In 10 Coke, R. 56, it is laid down that covin shall never be intended or presumed in at law, if it be expressly averred: Qui odiosa et inhonesta non sunt in lege præsumenda, et, in facto, quod se habit ad bonum et malum, magis de bono, quam de malo, præsumendum est. And this is in conformity to the rule of the civil law. Dolum ex indiciis perspicuis probari convenit. Cod. Lib. 2, tit. 21, l. 6.

[2] Trenchard *v.* Wanley, 2 P. Will. 166; Townsend *v.* Lowfield, 1 Ves. 35; 3 Atk. 534; Walker *v.* Symonds, 3 Swanst. R. 61; Bath and Montague's Case, 3 Ch. Cas. 85; 1 Madd. Ch. Pr. 208; 1 Fonbl. Eq. B. 1, ch. 11, § 8.

[3] See Warner *v.* Daniels, 1 Wood. & Min. 103.

[4] Chesterfield *v.* Janssen, 2 Ves. 155, 156.

has illustrated the same proposition by remarking, that a Court of Equity will, as it ought, in many cases order an instrument to be delivered up, as unduly obtained, which a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and are not satisfied, though it may be strongly presumed.[1]

§ 191. One of the largest classes of cases, in which Courts of Equity are accustomed to grant relief, is where there has been a misrepresentation, or *suggestio falsi*.[2] It is said, indeed, to be a very old head of Equity, that, if a representation is made to another person, going to deal in a matter of interest, upon the faith of that representation, the former shall make that representation good, if he knows it to be false.[3] To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation; but that it is in a matter of substance, or important to the interests of the other party, and that it actually does mislead him.[4] For, if the misrepresentation was of a trifling or immaterial thing; or if the other party did not trust to it, or was not misled by it; or if it was vague and inconclusive in its own nature; or if it was upon a matter of opinion or fact, equally open to the inquiries of both parties, and in regard to which neither could be presumed to trust the other; in these and the like cases there is no reason for a Court

[1] Fullager *v.* Clark, 18 Ves. 483.

[2] Broderick *v.* Broderick, 1 P. Will. 240; Jarvis *v.* Duke, 1 Vern. 20; Evans *v.* Bicknell, 6 Ves. 173, 182.

[3] Evans *v.* Bicknell, 6 Ves. 173. 182.

[4] Neville *v.* Wilkinson, 1 Bro. Ch. R. 546; Turner *v.* Harvey, Jacob, Rep. 178; 1 Fonbl. Eq. B. 1, ch. 2, § 8; Small *v.* Atwood, 1 Younge, R. 407, 461; S. C. in Appeal, 6 Clark & Finnell. 232, 395; Hough *v.* Richardson, 3 Story, R. 659.

of Equity to interfere to grant relief upon the ground of fraud.[1]

§ 192. Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression,[2] in order to mislead another,[3] or to entrap or cheat him, or to obtain an undue advantage of him; in every such case there is a positive fraud in the truest sense of the terms.[4] There is an evil act with an evil intent; *dolum malum ad circumveniendum.* And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead,[5] as well as by positive assertions.[6] The Civil Law has well expressed this, when it says: *Dolo malo pactum fit, quotiens circumscribendi alterius causâ, aliud agitur, et aliud agi simulatur.*[7] And again: *Dolum malum à se abesse præstare venditor debet, qui non tantum in eo est, qui fallendi causâ obscurè loquitur, sed etiam, qui insidiosè obscurè dissimulat.*[8] The case here put falls directly within one of the species of frauds enumerated by Lord Hard-

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1 See 1 Domat, B. 1, tit. 18, § 3, art 2; Trower *v.* Newcome, 3 Meriv. R. 704; 2 Kent, Comm. Lect. 39, p. 484, (2d edit.); Atwood *v.* Small, 6 Clark & Finnell. 232, 233; S. C. Small *v.* Atwood, in Court of Exchequer, 1 Younge, R. 407.

2 See Laidlaw *v.* Organ, 2 Wheaton, R. 178, 195; Pidcock *v.* Bishop, 3 B. & Cressw. 605; Smith *v.* The Bank of Scotland, 1 Dow, Parl. R. 72; Evans *v.* Bicknell, 6 Ves. 173, 182.

3 See The State *v.* Holloway, 8 Blackf. 45.

4 Atwood *v.* Small, 6 Clark & Finnell. R. 232, 233; S. C. in Court of Exchequer, 1 Younge, R. 407; Taylor *v.* Ashton, 11 Mees. & Welsb. 401; Warner *v.* Daniels, 1 Wood. & Min. 103.

5 See Chisolm *v.* Gadsden, 1 Strobh. 220.

6 3 Black. Comm. 165; 2 Kent, Comm. Lect. 39; p. 484, (2d edit.); Laidlaw *v.* Organ, 2 Wheaton, 195; 1 Dow, Parl. R. 272.

7 Dig. Lib. 2, tit. 14, l. 7, § 9.

8 Dig. Lib. 18, tit. 1, l. 43, § 2; Pothier de Vente, n. 234, 237, 238.

wicke, to wit, fraud arising from facts and circumstances of imposition.[1]

§ 193. Whether the party, thus misrepresenting a material fact, knew it to be false, or made the assertion without knowing, whether it were true or false, is wholly immaterial;[2] for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false.[3] And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party.[4]

[1] Chesterfield *v.* Janssen, 2 Ves. 155. — In Neville *v.* Wilkinson, 1 Bro. Ch. R. 516, the Lord Chancellor (Thurlow) said: "It has been said, here is no evidence of actual fraud on R.; but only a combination to defraud him. A Court of Justice would make itself ridiculous, if it permitted such a distinction. Misrepresentation of circumstances is admitted, and there is positively a deception." And he added: "If a man, upon a treaty for any contract, will make a false representation, by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud. It misleads the parties contracting, on the subject of the contract."

[2] See Wright *v.* Snowe, 2 De Gex & Smale, 321.

[3] Ainslie *v.* Mendlycott, 9 Ves. 21; Graves *v.* White, Freem. R. 57. See also Pearson *v.* Morgan, 2 Bro. Ch. R. 389; Foster *v.* Charles, 6 Bing. R. 396; S. C. 7 Bing. R. 105; Taylor *v.* Ashton, 11 Mees. & Welsb. 401; Smith *v.* Mitchell, 6 Georgia, R. 458; Hazard *v.* Irwin, 18 Pick. 85. See also Doggett *v.* Emerson, 3 Story, C. C. 733; Hough *v.* Richardson, Id. 691; Mason *v.* Crosby, 1 Wood. & Minot, 352; Smith *v.* Babcock, 2 Id. 246; Hammatt *v.* Emerson, 27 Maine, 308.

[4] See Pearson *v.* Morgan, 2 Bro. Ch. R. 389; Burrows *v.* Locke, 10 Ves. 475; De Manville *v.* Compton, 1 Ves. & B. 355; Ex parte Carr, 3 Ves. & B. 111; 1 Marsh. on Insur. B. 1, ch. 10, § 1; Carpenter *v.* American Ins. Co. 1 Story, R. 57. In Pearson *v.* Morgan, 2 Bro. Ch. R. 385, 388, the case was, that A, being interested in an estate in fee, which was charged with £8,000, in favor of B, was applied to by C, who was about to lend money to B, to know if the £8,000 was still a subsisting charge on the estate. A stated that it was, and C lent his money to B accordingly; it appearing afterwards that the charge had been

[§ 193 *a*. The same general principles apply, whether the fraud was perpetrated by the party directly interested, or by an agent, if it be adopted by the principal. If the latter persists in taking the benefit of his agent's fraud, it is immaterial whether the fraud was originally concocted by the principal or by the agent; the principal will be held implicated to the fullest extent, if he adopts the acts of his agent.[1] But where the alleged fraud by a vendor of real estate, consisted in a fraudulent concealment of a right of way over the premises, proof of concealment by the vendor's agent has been held not sufficient to set aside the purchase; there must be proof of direct personal knowledge and concealment by the principal himself. And constructive knowledge of an agent, or knowledge acquired by him, otherwise than as agent for such sale, of a fact, the non-communication of which is made the ground of relief against the purchase, does not at all affect the contract.[2]]

§ 194. These principles are so consonant to the dictates of natural justice, that it requires no argument to enforce or support them. The principles of natural justice and sound morals do, indeed, go further; and require the most scrupulous good faith, candor, and truth, in all dealings whatsoever. But Courts of Justice generally find themselves compelled to assign

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satisfied, it was, nevertheless, held, that the money lent was a charge on the lands in the hands of A's heirs, because he either knew, or ought to have known, the fact of satisfaction, and his representation was a fraud on C.

[1] Fitzsimmons *v.* Joslin, 21 Vermont, R. 129, where the subject is ably examined by Redfield, J., and the case of Cornfoot *v.* Fowke, 6 M. & W. 358, is condemned. See Fuller *v.* Wilson, 3 Ad. & Ell. N. S. 58.

[2] Wilde *v.* Gibson, 1 House of Lords Cases, 605.

limits to the exercise of their jurisdiction, far short of the principles deducible *ex æquo et bono;* and, with reference to the concerns of human life, they endeavor to aim at mere practical good and general convenience. Hence many things may be reproved in sound morals, which are left without any remedy, except by an appeal *in foro conscientiæ* to the party himself.[1] Pothier has expounded this subject with his usual force and sterling sense. "As a matter of conscience," (says he,) "any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. Any dissimulation concerning the object of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith; for, since we are commanded to love our neighbor as ourselves, we are not permitted to conceal from him any thing which we should be unwilling to have had concealed from ourselves under similar circumstances. But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party, with whom he has contracted. Nothing, but what is plainly injurious to good faith, ought to be there considered as a fraud, sufficient to impeach a contract; such as the criminal manœuvres and artifices employed by one party to induce the other to enter into the contract. And these should be fully substantiated by proof. *Dolum non nisi perspicuis indiciis probari convenit.*" [2]

§ 195. The doctrine of law, as to misrepresentation,

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[1] Pothier de Vente, n. 231, 235, 239.

[2] 1 Pothier on Oblig. by Evans, p. 19, n. 30; Cod. Lib. 2, tit. 21, l. 6; Taylor *v.* Fleet, 4 Barbour, S. C. R. 107; Irvine *v.* Kirkpatrick, 5 Eng. Law & Eq. R. 17.

being in a practical view such, as has been already stated, it may not be without use to illustrate it by some few examples. In the first place, the misrepresentation must be of something material, constituting an inducement or motive to the act or omission of the other party, and by which he is actually misled to his injury.[1] Thus, if a person owning an estate, should sell it to another, representing that it contained a valuable mine, which constituted an inducement to the other side to purchase, and the representation were utterly false, the contract for the sale, and the sale itself, if completed, might be avoided for fraud; for the representation would go to the essence of the contract.[2] [So, where one wishing to sell a public house falsely represented that the monthly receipts amounted to such a sum.[3] So, of a representation that the estate was in the county of A, but which was, in fact, in another county.[4]] But if he should represent that the estate contained twenty acres of wood-land or meadow, and the actual quantity was only nineteen acres and three quarters, there, if the difference in quantity would have made no difference to the purchaser in price, value, or otherwise, it would not, on account of its immateriality, have avoided the contract.[5] [So, a representation that a certain spring of water was on the

[1] Phillips *v.* Duke of Bucks, 1 Vern. 227; 1 Fonbl. Eq. B. 1, ch. 2, § 8.

[2] See Lowndes *v.* Lane, 2 Cox, R. 363.

[3] Philmore *v.* Hood, & Scott, 827.

[4] Best *v.* Stow, 2 Sandf. Ch. R. 298.

[5] See the Morris Canal Co. *v.* Emmett, 9 Paige, R. 168; Stebbins *v.* Eddy, 4 Mason, R. 414; 2 Freem. R. 107; Winston *v.* Gwathmey, 8 B. Monroe, 19; Twypont *v.* Warcup, Finch, R. 310; Winch *v.* Winchester, 1 Ves. & Beam. 375. [But see Elliot *v.* Bean, 9 Ala. 772.]

land, but which was found to be just without the limits, will not avoid the contract, the spring not being a material inducement to the purchaser.[1] So, if a person should sell a ship to another, representing her to be five years old, of a certain tonnage, coppered and copper-fastened, and fully equipped, and found with new sails and rigging; either of these representations, if materially untrue, so as to affect the essence or value of the purchase, would avoid it. But a trifling difference in either of these ingredients, in no way impairing the fair value or price, or not material to the purchaser, would have no such effect. Thus, for instance, if the ship was a half ton less in size, was a week more than five years old, was not copper-fastened in some unimportant place, and was deficient in some trifling rope, or had some sails, which were in a very slight degree worn; these differences would not avoid the contract. [So, of a misrepresentation by a horse dealer, as to the place where he purchased the horse, offered by him for sale[2]]; for under such circumstances, the difference must be treated as wholly inconsequential.[3] The rule of the Civil Law would here apply; *Res, bonâ fide vendita propter minimam causam inempta fieri non debil.*[4] Indeed, it may be laid down as a general rule, that, when the sale is fair, and the parties are equally innocent, and the thing is sold in gross, by the quantity, by estimation and not by measurement, a deficiency will not ordinarily entitle a

1 Winston *v.* Gwathmey, 8 B. Monroe, 19
2 Geddes *v.* Pennington, 5 Dow, 159
3 See 1 Domat, B. 1, tit. 2, § 11, art 12.
4 Dig. Lib 18, tit. 1, l 54, 1 Domat, B. 1, tit. 2, § 11, art. 3.

party to relief, either by an allowance for the deficiency, nor by a rescission of the contract.[1] Thus, for example, the sale of a farm by known boundaries, containing by estimation a certain number of acres, will bind both parties, whether the farm contains more or less.[2]

§ 196. So, if an executor of a will should obtain a release from a legatee, upon a representation that he had no legacy left him by the will, which was false;[3] or, if a devisee should obtain a release from the heir at law, upon a representation that the will was duly executed,[4] when it was not; in each of these cases the release might be set aside for fraud.[5] But if, in point of fact, in the first case, the legacy, though given in the will, had been revoked by a codicil; or, in the second case, if the will had been duly executed, although not at the time, or in the manner, or under the circumstances, stated by the devisee; the misrepresentation would not avoid the release, because it is immaterial to the rights of either party.

§ 197. In the next place, the misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other.[6] It

[1] Stebbins *v* Eddy, 4 Mason, R 414, Morris Canal Co *v* Emmett, 9 Paige, R 168

[2] Ibid, Ante, § 144 *a*

[3] Jarvis *v* Duke, 1 Vern. 19.

[4] Broderick *v*. Broderick, 1 P. Will 239, 240; Pusey *v*. Desbouvrie, 3 P. Will. 318, 320.

[5] [As to setting aside a release on account of fraud, see Ferris *v* Crawford, 2 Denio, 595.]

[6] See Smith *v*. The Bank of Scotland, 1 Dow, Parl. R. 275, Laidlaw *v*. Organ, 2 Wheaton, R. 178, 195; Evans *v*. Bicknell, 6 Ves. 173, 182 to 192.

must not be a mere matter of opinion,[1] equally open to both parties for examination and inquiry, whe neither party is presumed to trust to the other, but to rely on his own judgment. Not but that misrepresentation, even in a matter of opinion, may be relieved against as a contrivance of fraud, in cases of peculiar relationship or confidence, or where the other party has justly reposed upon it, and has been misled by it. But, ordinarily, matters of opinion between parties, dealing upon equal terms, though falsely stated, are not relieved against; because they are not presumed to mislead, or influence the other party, when each has equal means of information. Thus, a false opinion, expressed intentionally by the buyer to the seller, of the value of the property offered for sale, where there is no special confidence, or relation, or influence between the parties, and each meets the other on equal grounds, relying on his own judgment, is not sufficient to avoid a contract of sale.[2] In such a case, the maxim seems to apply; *Scientia, utrinque par, pares contrahentes facit.*[3]

[1] See Ferson *v.* Sanger, 1 Wood. & Min. 146; Warner *v.* Daniels, Id. 98.

[2] But see Wall *v.* Stubbs, 1 Madd. R. 80; Cadman *v.* Horner, 18 Ves. 10; 2 Kent, Comm. Lect. 39, p. 485, (4th edit.) — A mistaken opinion of the value of property, if honestly entertained, and stated as opinion merely, unaccompanied by any assertion or statement untrue in fact, can never be considered as a fraudulent misrepresentation. Hepburn *v.* Dunlop, 1 Wheaton, R. 189; Irvine *v.* Kirkpatrick, 3 Eng. Law & Eq. R. 17.

[3] 1 Marshall on Insur. B. 1, ch. 11, § 3, p. 473; 1 Domat, B. 1, tit. 2, § 11, art. 3, 11, 12. — Mr. Chancellor Kent has expounded the doctrine on this subject with admirable clearness and strength in the following passage of his Commentaries. (Vol. 2, Lect. 39, p. 484, 485, 4th edit.) "When, however, the means of information relative to facts and circumstances, affecting the value of the commodity, are equally accessible to both parties, and neither of them does or says any thing tending to impose upon the other, the disclosure of any superior knowledge, which one party may have over the other, as to those facts and circumstances,

§ 198. But it would be otherwise, where a party knowingly places confidence in another, and acts upon his opinion, believing it to be honestly expressed.[1] Thus, if a man of known skill and judgment in paintings should sell a picture to another, representing it to have been painted by some eminent master, as, for instance, by Reubens, Titian, or Correggio, and it should be false; there can be no doubt that it would be a misrepresentation, for which the sale might be avoided.[2] And the same principle would apply in a like case, if he should falsely state his opinion to be, that it was a genuine painting of a great master, with an intent to influence the buyer in the purchase, and

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is not requisite to the validity of a contract. There is no breach of any implied confidence, that one party will not profit by his superior knowledge as to facts and circumstances, open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judges for himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill, and diligence. The Common Law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars, which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects, which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim, Caveat emptor, ought to apply. Even against this maxim he may provide by requiring the vendor to warrant that which the law would not imply to be warranted; and if the vendor be wanting in good faith, Fides servanda is a rule equally enforced at Law and in Equity." See also 1 Domat, B. 1, tit. 2, § 11.

[1] See Shaeffer *v.* Sleade, 7 Blackf. 178.

[2] See 1 Pothier on Oblig. n. 17 to 20, and note (*a*); Atwood *v.* Small, 6 Clark & Finnell. 232, 233; S. C. 1 Younge, R. 407.

the latter, placing confidence in the skill, and judgment, and assertion of the seller, should complete the purchase on the faith thereof. But if the seller should truly represent the painting to be of such a master, and add, that it once belonged to a nobleman, or was fixed in a church (which circumstances he knew to be untrue); in such a case, if the representation of these collateral circumstances had no real tendency in the mind of the buyer to enhance or influence the purchase, it would not avoid the contract.[1]

§ 199. Nor is it every wilful misrepresentation even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for Courts of Equity, like Courts of Law, do not aid parties who will not use their own sense and discretion upon matters of this sort.[2] This may be illustrated by a case at law, where a party, upon making a purchase for himself and his partners, falsely stated to the seller, to induce him to the sale, that his partners would not give more for the property than a certain price. It was held, that no

[1] See 2 Kent, Comm. Lect. 39, p. 482, 483, (4th edit.); Hill *v.* Gray, 1 Starkie, R. 352. [Hill *v.* Gray has sometimes been doubted, but, as it is explained in the late case of Keates *v.* Cadogan, 2 Eng. Law & Eq. R. 321, it is in harmony with the current of authorities. Chief Justice Jervis there observed: "In Hill *v.* Gray, there appears to have been a *positive aggressive deceit*. Not removing the delusion into which the purchaser had fallen, of supposing the picture to have been one of Sir Felix Agar's, might be equivalent to an express misrepresentation.]

[2] See Trower *v.* Newcome, 3 Meriv. R. 704; Scott *v.* Hanson, 1 Simons, R. 13; Fenton *v.* Browne, 16 Ves. 144; 2 Kent, Comm. Lect. 39, p. 184, 485, (4th edit.); Id. 486, 487, note (*b*); Davis *v.* Meeker, 5 Johns. R. 354; Hervey *v.* Young, Belv. R. 21, and Metcalf's note; 1 Domat, B. 1, tit. 2, § 11, art. 11, 12; Sherwood *v.* Salmon, Day, R. 128. See Jusan *v.* Toulmin, 9 Ala. 662.

action would lie at law for a deceitful representation of this sort. Lord Ellenborough on this occasion expressed himself in the following language, which presents many suggestions, applicable to the subject now under consideration. "If" (said he) "an action be maintainable for such a false representation of the will and purpose of another, with reference to the proposed sale, should not an action be also at least equally maintainable for a false representation of the party's own purpose? But can it be contended, that an action might be maintained against a man for representing that he would not give, upon a treaty of purchase, beyond a certain sum, when it could be proved, that he had said, he would give much more than that sum? And supposing, also, that he had upon such treaty added, as a reason for his resolving not to give beyond a certain sum, that the property was, in his judgment, damaged in any particular respect; and supposing, further, that it could be proved he had, just before the giving such reason, said, he was satisfied it was not so damaged; would an action be maintainable for this untrue representation of his own purpose, backed and enforced by this false reason given for it? And, in the case before us, does the false representation, made by the defendant, of the determination of his partners, amount to any thing more than a falsely alleged reason for the limited amount of his own offer? And if it amount to no more than this, it should be shown, before we can deem this to be the subject of an action, that, in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of law, the party treating for a purchase is bound to allege, truly, if he state at all, the motives which operate with him for treating, or for making the offer, he in fact makes. A seller is

unquestionably liable to an action of deceit, if he fraudulently represent the quality of the thing sold to be other than it is, in some particulars, which the buyer has not equal means with himself of knowing; or if he do so in such a manner as to induce the buyer to forbear making the inquiries, which, for his own security and advantage, he would otherwise have made. But is a buyer liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity, than the price which such proposed buyer offers? I am not aware of any case, or recognized principle of law, upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum* by the bidder, in respect to which the bidder was under no legal pledge or obligation to the seller for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely; and for the consequences of which reliance, therefore, he can maintain no action."[1]

§ 200. A Court of Equity would, under the like circumstances, probably hold a somewhat more rigorous doctrine, at least, if the party appeared to have been materially influenced by the representation to his disadvantage; and, if it did not avoid the contract, it would refuse a specific performance of it.[2] If the seller of a farm should falsely affirm at the sale, that it

[1] Vernon *v.* Keys, 12 East, 637, 638, Sugden on Vendors, (7th edit.) p 6 See also Davis *v.* Mecker, 5 Johns R 354, 2 Kent, Comm. Lect. 39, p 486, and note (*b*), Id 487, (4th edit), Maddeford *v.* Austwick, 1 Sim. 89.

[2] 2 Kent, Comm Lect 39, p 486, 487, and note (*b*), (4th edit); Buxton *v* Lister, 3 Atk. 386.

been valued by two persons at the price, and the assertion had induced the buyer to purchase it, the contract would certainly not be enforced in Equity; and, upon principle, it would seem to be void. So, if a vendor, on a treaty for the sale of property, should make representations which he knows to be false, the falsehood of which, however, the purchaser has no means of knowing, but he relies on them, a Court of Equity will rescind the contract entered into upon such treaty, although the contract may not contain the misrepresentations.[1] But then, in all such cases, the Court will not rescind the contract without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was founded upon them.[2]

§ 200 *a*. On the other hand, if the purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his agents, he cannot be heard to say, that he was deceived by the vendor's misrepresentations; for the rule is, *Caveat emptor*, and the knowledge of his agents is as binding on him as his own knowledge.[3] It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury, in such a case, to his own negligence and indiscretion.[4] Courts of Equity do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a reasonable diligence or discretion.

[1] Atwood *v.* Small, 6 Clark & Finnel. R 232, 233.

[2] Ibid. [3] Ibid.

[4] [In Spalding *v.* Hedges, 2 Barr, 240, it was held that, if a party made false representations of a fact as to land situated in a distant country, it is immaterial that the other party had correct sources of information.]

§ 201. To the same ground of unreasonable indiscretion and confidence, may be referred the common language of puffing and commendation of commodities, which, however reprehensible in morals, as gross exaggerations, or departures from truth, are nevertheless not treated as frauds which will avoid contracts. In such cases the other party is bound, and indeed is understood, to exercise his own judgment, if the matter is equally open to the observation, examination, and skill of both. To such cases the maxim applies; *Simplex commendatio non obligat.* The seller represents the qualities or value of the commodity, and leaves them to the judgment of the buyer.[1] The Roman Law adopted the same doctrine. *Ea quæ commendandi causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant; veluti, si dicat servum speciosum, domum bene ædificatam.*[2] But, if the means of knowledge are not equally open, the same law pronounced a different doctrine. *At, si dixerit, hominem literatum, vel artificem, præstare debet; nam hoc ipso pluris vendidit.*[3] The misrepresentation enhances the price. The same rule will apply if any artifice is used to disguise the character or quality of the commodity;[4] or to mislead the buyer at the sale; such as using puffers[5] and underbidders at an auction, or other sale; or

[1] 2 Kent, Comm. Lect. 39, p 485, (4th edit.)

[2] Dig. Lib. 18, tit. 1, l. 43.

[3] Dig. Lib. 18, tit. 1, l. 43.

[4] 2 Kent, Comm. Lect. 39, p. 482, 483, 484, (4th edit.); Turner v. Harvey, Jacob, R. 178.

[5] [But quære, whether "using puffers" is alone sufficient to rescind a sale, unless the purchaser was induced thereby to pay more than the article was worth; or at least more than he would otherwise have given. See Tomlinson v. Savage, 6 Ired. Eq. R. 430; Latham v. Morrow, 6 B. Monroe, 630, Veazie v. Williams, 3 Story, 623, Wolfe v. Luyster, 1 Hall, 146, National Fire Ins. Co. v. Loomis, 11 Paige, 431.]

holding out false colors, and thereby taking the buyer by surprise.[1]

§ 202. In the next place, the party must be misled by the misrepresentation; for, if he knows it to be false, when made, it cannot be said to influence his conduct; and it is his own indiscretion, and not any fraud or surprise, of which he has any just complaint to make under such circumstances.[2]

§ 203. And, in the next place, the party must have been misled to his prejudice or injury; for Courts of Equity do not, any more than Courts of Law, sit for the purpose of enforcing moral obligations, or correcting unconscientious acts, which are followed by no loss or damage. It has been very justly remarked, that, to support an action at law for a misrepresentation, there must be a fraud committed by the defendant, and a damage resulting from such fraud to the plaintiff.[3] And it has been observed with equal truth by a very learned Judge in Equity, that fraud and damage coupled together will entitle the injured party to relief in any Court of Justice.[4]

§ 203 *a*. In the next place, the defrauded party may, by his subsequent acts, with full knowledge of the fraud, deprive himself of all right to relief as well in Equity as at Law. Thus, for example, if with full knowledge of the fraud, he should settle the matter in relation to which the fraud was committed, and give a release to the party who has defrauded him, he would

[1] Bromley *v.* Alt, 3 Ves. 624; Smith *v* Clarke, 12 Ves 483, Twining *v* Morrice, 2 Bro. Ch. R. 330, Marquis of Townshend *v.* Stangroom, 6 Ves. 338; Bexwell *v* Christie, Cowper, R 385, 1 Fonbl. Eq B. 1, ch. 4, § 4, note (*x*), Pickering *v.* Dawson, 4 Taunt. R. 785.

[2] See Pothier de Vente, n 210.

[3] Vernon *v.* Keys, 12 East, 637, 638.

[4] Bacon *v* Bronson, 7 Johns. Chan R 201, Fellows *v.* Lord Gwydyr, 1 Simons, R. 63, Turnbull *v.* Gadsden, 2 Strobh. Eq. R. 14.

lose all title to legal and equitable relief.[1] The like rule would apply, if he knew all the facts, and with such full information he continued to deal with the party.[2]

§ 204. Another class of cases for relief in Equity is, where there is an undue concealment, or *suppressio veri*, to the injury or prejudice of another.[3] [*A suppressio veri* is as fatal as a *suggestio falsi*.[4]] It is not every concealment, even of facts material to the interest of a party, which will entitle him to the interposition of a Court of Equity. The case must amount to the suppression of facts, which one party, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot innocently be silent.[5] It has been said by Cicero, *Aliud est celare, aliud tacere. Neque enim id est celare, quidquid reticeas; sed cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire.*[6] It has been remarked by a learned author, that this definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it

[1] Parsons *v.* Hughes, 9 Paige, R. 591

[2] Vigers *v* Pike, 3 Clark & Finnell R. 545, 630 See Jackson *v* Summerville, 1 Harris, 359; Dingley *v* Robinson, 5 Greenl. 127, Duncan *v* McCullough, 1 S. & R. 483; Adams *v.* Shelby, 10 Ala. 478, Galloway *v* Holmes, 2 Dougl. 330.

[3] 1 Fonbl. Eq. B 1, ch, 2, § 8, and note (*z*), Id. ch 3, § 4, and notes, Jarvis *v.* Duke, 1 Vern. R. 19, Evans *v.* Bicknell, 6 Ves 173, 182 Sometimes, as in the case of Broderick *v.* Broderick, (1 P. Will. 239, 240,) there may occur both a *suppressio veri* and a *suggestio falsi*

[4] Warner *v.* Daniels, 1 Wood. & Min. 90.

[5] [Irvine *v.* Kirkpatrick, 3 Eng Law and Eq. R. 17, Jusan *v.* Toulmin, 9 Ala. 662. See Vane *v.* Cobbold, 1 Exch. R 798, for an instance of an omission to communicate facts which did not amount to a legal fraud.]

[6] Cic. de Offic. Lib. 3, ch. 12, 13. See also Pothier de Vente, n. 242, 243.

void in favor of either party, who is misled by his ignorance of the thing concealed.[1] And Cicero proceeds to denounce such concealment in terms of vehement indignation. *Hoc autem celandi genus quale sit, et cujus hominis, quis non videt? Certè non aperti, non simplicis, non ingenui, non justi, non viri boni; versuti potius, obscuri, astuti, fallacis, malitiosi, callidi, veteratoris, vafri.*[2]

§ 205. But this statement is not borne out by the acknowledged doctrines, either of Courts of Law, or of Courts of Equity, in a great variety of cases. However correct Cicero's view may be of the duty of every man, in point of morals, to disclose all facts to another, with whom he is dealing, which are material to his interest;[3] yet, it is by no means true, that Courts of Justice generally, or, at least, in England and America, undertake the exercise of such a wide and difficult jurisdiction.[4] Thus it has been held by Lord Thurlow, (and the

[1] Marshall on Insur. B. 1, ch. 11, § 3, p. 473.

[2] Cic de Offic. Lib. 3, cap. 13.

[3] Dr. Paley adopts Cicero's doctrine in its full extent, as a duty of moral and religious obligation. "To advance (says he) a direct falsehood in recommendation of our wares, by ascribing to them some quality, which we know they have not, is dishonest. Now, compare with this the designed concealment of some fault, which we know they have. The motives and the effects of actions are the only points of comparison, in which their moral quality can differ. But the motives in these two cases are the same, namely, to produce a higher price than we expect otherwise to obtain; the effect, that is, the prejudice, to the buyer is the same." Paley, Moral Philos. B. 3, ch. 7, p. 116. The question, What degree of concealment is unjust in a legal or moral sense? has been often mooted by distinguished jurists, as well upon the cases put by Cicero, as in other cases. See Grotius, B. 2, ch. 12, § 9; Pufendorf, Law of Nature, B. 5, ch. 3, § 4; Pothier de Vente, n. 233 to 242; Id. n. 297, 298; 2 Kent, Comm. Lect. 39, p. 485 to 491 (4th edit) and notes; 1 Ruth. Inst. B. 1, ch. 13, § 11 to 19.

[4] See Pothier, Contrat de Vente, n. 231, 239, 242, 243; 1 Domat, B. 1, tit. 2, § 11; 2 Kent, Com. Lect. 39, p. 484, 485, 490, 491, and note (c), 4th edit.

case falls precisely within the definition by Cicero of undue concealment,) that if A, knowing there to be a mine in the land of B, of which he knows B to be ignorant, should, concealing the fact, enter into a contract to purchase the estate of B for a price which the estate would be worth without considering the mine, the contract would be good; because A, as the buyer, is not obliged, from the nature of the contract, to make the discovery. In such cases, the question is not, whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have taken. But it is essentially necessary, in order to set aside the transaction, not only, that a great advantage should be taken, but, also, that there should be some obligation on the party to make the discovery. A Court of Equity will not correct or avoid a contract, merely because a man of nice honor would not have entered into it. The case must fall within some definition of fraud; and the rule must be drawn, so as not to affect the general transactions of mankind.[1] And this, in effect, is the conclusion to which Pothier arrived, after a good deal of struggle, in adjusting the duties arising from moral obligation, with the necessary freedom and convenience of the common business of human life.[2]

§ 206. Mr. Chancellor Kent, in his learned commentaries, after admitting the doctrine and authority of Lord Thurlow, in the case above stated, concludes with the following acute and practical reflections. "From this and other cases it would appear, that human laws are not so perfect as the dictates of conscience, and the

[1] Fox v. Mackreth, 2 Bro. Ch. R. 420; 1 White and Tudor's Eq. Lead. Cas. 72, and note; Turner v. Harvey, 1 Jacob, R. 178.

[2] Pothier de Vente, n. 234 to 242; Id. n. 295 to 299; Ante, § 194.

sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties, that belong to the class of imperfect obligations, which are binding on conscience, but which human laws do not and cannot undertake directly to enforce. But, when the aid of a Court of Equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway. And a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery. It is a rule in Equity, that all the material facts must be known to both parties, to render the agreement fair and just in all its parts; and it is against all the principles of Equity, that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance."[1] The importance and value of the distinction here pointed out, will be made more apparent, when we come to the consideration of the cases in which Courts of Equity refuse to decree a specific performance of contracts, which yet they will not undertake to set aside.[2]

§ 207. The true definition, then, of undue concealment, which amounts to a fraud in the sense of a Court of Equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances, which one party is under some legal or equitable obligation to communicate to the other; and which the latter has a right not merely *in foro conscientiæ*, but *juris et de jure* to

[1] 2 Kent, Comm. Lect. 39, p. 490, 491, (4th edition); Parker v. Grant, 1 Johns. Ch. R. 630; Ellard v. Llandaff, 1 B. & Beatt. 250, 251.

[2] See 2 Story on Eq. Jurisp. § 693, 769, 770.

know.[1] Mr. Chancellor Kent has avowed a broader doctrine. "As a general rule," (says he,) each party is bound in every case to communicate to the other his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation."[2] This doctrine, in this latitude of expression, may, perhaps, be thought not strictly maintainable, or in conformity with that which is promulgated by Courts of Law or Equity. For many most material facts may be unknown to one party, and known to the other, and not equally accessible, or at the moment within the reach of both; and yet contracts founded upon such ignorance on one side, and knowledge on the other, may be completely obligatory.[3] Thus, if one party has actual

[1] Fox v. Mackreth, 2 Bro. Ch R. 420; 1 White & Tudor's Eq. Lead Cas. 72 and notes; Irvine v. Kirkpatrick, 5 Eng. Law & Eq. R. 17; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*). Mr. Justice Buller, in Pearson v. Morgan, 2 Bro. Ch. R. 390, said: "In cases where it [fraud] is a question of fact, it is always considered as a constructive fraud, where the party knows the truth and conceals it; and such constructive fraud always makes the party liable." But in that case the party, when applied to, misrepresented the fact, and concealed the truth; and the language must be limited to such circumstances. See Fox v. Mackreth, 2 Bro. Ch. R 120; Turner v. Harvey, Jacob, R. 178.

[2] 2 Kent, Comm. Lect. 39, p. 482, (4th edit.) and note, ibid., where it is now qualified.

[3] The case of the unknown mine, already put, in the case of Fox v. Mackreth, 2 Bro. Ch. R. 420, seems to fall within this predicament; and in Turner v. Harvey, Jacob, R. 178, Lord Eldon said: "The Court in many cases has been in the habit of saying, that, where parties deal for an estate, they may put each other at arm's-length; the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of the property. As in the case that has been mentioned, if an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry; I am not bound to give him any information of it. He acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the

knowledge of an event or fact from private sources, not then known to the other party from whom he purchases goods, and which knowledge would materially enhance the price of the goods, or change the intention of the party as to the sale; the contract of sale of the goods will, nevertheless, be valid.[1]

§ 208. Even Pothier himself, strongly as he inclines, in all cases of this sort, to the principles of sound morals, declares, that the buyer cannot be heard to complain, that the seller has not informed him of circumstances extrinsic of the thing sold, whatever may be the interest which he has to know them.[2] So that the doctrine of Mr. Chancellor Kent would seem to require some qualification, by limiting it to cases where one party is under some obligation to communicate the facts, or where there is a peculiar known relation, trust, or confidence, between them, which authorizes the other party to act upon the presumption, that there is no concealment of any material fact. Thus, if a vendor should sell an estate, knowing that he had no title to it, or knowing that there were encumbrances on it, of which

application of the principle. If a single word is dropped which tends to mislead the vendor, that principle will not be allowed to operate." See also Ante, § 117 and 148.

[1] See Laidlaw *v.* Organ, 2 Wheaton, 178; Matthews *v.* Bliss, 22 Pick. 48; Fox *v.* Mackreth, 2 Bro. Ch. R. 20. In Laidlaw *v.* Organ, 2 Wheaton, 195, the question was put in this general form: "Whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor?" And on this question, so put, the Court expressed an opinion, "that he was not bound to communicate it," without adding any qualification. But the Court added: "It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties." Ante, § 149.

[2] Pothier de Vente, n. 242, 298, 299.

the vendee was ignorant; the suppression of such a material fact, in respect to which, the vendor must know that the very purchase implied a trust and confidence on the part of the vendee, that no such defect existed, would clearly avoid the sale on the ground of fraud.[1]

§ 209. The like reason would apply to a case where the vendor should sell a house, situate in a distant town, which he knew at the time to be burnt down, and of which fact the vendee was ignorant; for it is impossible to suppose, that the actual existence of the house should not be understood by the vendee, as implied on the part of the vendor, at the time of the bargain.[2] The same doctrine prevails in the Civil Law. *Sin autem venditor quidem sciebat domum esse exustam, emptor autem ignorabat, nullam venditionem stare.*[3]

§ 210. These latter cases are founded upon circumstances intrinsic in the contract, and constituting its essence. And there is often a material distinction between circumstances which are instrinsic, and form the very ingredients of the contract, and circumstances which are extrinsic, and form no part of it, although they may create inducements to enter into it, or affect the value or price of the thing sold.[4] Intrinsic circumstances are properly those which belong to the nature, character, condition, title, safety, use, or enjoyment, &c., of the subject-matter of the contract; such as natural or artificial defects in the subject-matter. Extrinsic

[1] Arnott *v.* Biscoe, 1 Ves. 95, 96; Pothier de Vente, n 210; Pillage *v.* Armitage, 12 Ves. 78; Ante, § 142, 143.

[2] See Pothier de Vente, n. 4, Ante, § 142.

[3] Dig. Lib. tit. 1, l. 57, § 1, Ante, § 142.

[4] 2 Kent, Comm. Lect. 39, p. 482, (4th edit.); Pothier, n. 242, 243; Id. n. 203 to 210; 1 Domat, B. 1, tit. 2, § 8, art. 11, Id. § 11, art. 2, 3, 5, 15.

circumstances are properly those which are accidentally connected with it, or rather bear upon it, at the time of the contract, and may enhance or diminish its value or price, or operate as a motive to make or decline the contract; such as facts respecting the occurrence of peace or war, the rise or fall of markets, the character of the neighborhood,[1] the increase or diminution of duties, or the like circumstances.

§ 211. In regard to extrinsic, as well as to intrinsic circumstances, the Roman law seems to have adopted a very liberal doctrine, carrying out to a considerable extent the clear dictates of sound morals. It required the utmost good faith in all cases of contracts, involving mutual interests; and it, therefore, not only prohibited the assertion of any falsehood, but also the suppression of any facts, touching the subject-matter of the contract, of which the other party was ignorant, and which he had an interest in knowing. In an especial manner it applied this doctrine to cases of sales; and required, that the vendor and vendee should disclose, each to the other, every circumstance within his knowledge, touching the thing sold, which either had an interest in knowing. The declaration in regard to the vendor (as we have seen) is: *Dolum malum a se abesse præstare venditor debet; qui non tantum in eo est, qui fallendi causâ obscurè loquitur; sed etiam, qui insidiosè, obscurè dissimulat;* and the same rule was applied to the vendee.[2] According to these principles, the vendor was by the Roman law required, not only not to conceal any

[1] Pothier de Vente, n. 236.

[2] Dig. Lib. 18, tit. 1, l. 43, § 2; Pothier de Vente, n. 233 to 211; Id. n. 296; Ante, § 192; Laidlaw v. Organ, 2 Wheaton, 178; Pothier de Vente, cited in note *c*, p. 185.

defects of the thing sold, which were within his knowledge, and of which the other party was ignorant, whenever those defects might, as vices, upon the implied warranty created by the sale, entitle him to a redhibition, or a rescission of the contract; but also all other defects, which the other party was interested in knowing.[1]

§ 212. In regard to intrinsic circumstances the Common Law, however, has, in many cases, adopted a rule very different from that of the Civil Law; and especially in cases of sales of goods. In such cases, the maxim, *Caveat emptor*, is applied; and unless there be some misrepresentation or artifice, to disguise the thing sold, or some warranty, as to its character or quality, the vendee is understood to be bound by the sale, notwithstanding there may be intrinsic defects and vices in it, known to the vendor, and unknown to the vendee, materially affecting its value. However questionable such a doctrine may be, in its origin, in point of morals or general convenience, (upon which many learned doubts have, at various times, been expressed,) it is too firmly established to be now open to legal controversy.[2] And Courts of Equity, as well as Courts of Law, abstain from any interference with it.

§ 213. In regard to intrinsic circumstances generally, Courts of Equity, as well as Courts of Law, seem to adopt the same maxim to a large extent, and relax its application, only when there are circumstances of peculiar trust or confidence, or relation between the parties.[3]

[1] Pothier de Vente, n. 235.

[2] See 2 Kent, Comm. Lect. 39, p. 478, 479 (4th edit.), 2 Black. Comm. 451.

[3] The case of Martin *v.* Morgan, 1 Brod. & Bing. R. 289, is a strong application of the doctrine of concealment, avoiding a payment. In that

§ 214. But there are cases of intrinsic circumstances, in which Courts of Law and Courts of Equity both proceed upon a doctrine strictly analogous to that of the Roman Law, and treat the concealment of them as a breach of trust and confidence justly reposed. Indeed, in most cases of this sort, the very silence of the party must import as much as a direct affirmation, and be deemed equivalent to it.[1]

§ 215. Thus, if a party, taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions, as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure; and the omission to make it, under such circumstances, is equivalent to an affirmation, that the facts do not exist.[2] So, if a party knowing himself to be cheated by his clerk, and, concealing the fact, applies for security, in such a manner, and under such circumstances as holds the clerk out to others, as one whom he considers as a trustworthy person; and another person becomes his security, acting under the impression that

case there was no special confidence between the parties; but a post-dated check being paid to the holder by a banker, at the time when the latter had no funds of the drawer, and the holder knew that the drawer had become insolvent, of which the banker was ignorant, the amount was allowed to be recovered back on account of the concealment.

[1] See Martin *v.* Morgan, 1 Brod. & Bing. 289; Pidcock *v.* Bishop, 3 B. & Cressw. 605; See Owen *v.* Homan, 3 Eng. Law & Eq. R. 121; Squire *v.* Whitton, 1 House of Lords Cases, 333; 2 Kent, Comm. Lect. 39, p. 483; Id. 488, note, (4th edit.); Smith *v.* Bank of Scotland, 1 Dow, Parl. R. 292, 294; Etting *v.* Bank of United States, 11 Wheaton, 59.

[2] Pidcock *v.* Bishop, 3 B. & Cressw. 605; See Owen *v.* Homan, 3 Eng. Law & Eq. R. 121; Squire *v.* Whitton, 1 House of Lords Cases, 333; Post, § 383.

the clerk is so considered by his employer; the contract of suretyship will be void;[1] for the very silence, under such circumstances, becomes expressive of a trust and confidence held out to the public, equivalent to an affirmation.

§ 216. Cases of insurance afford a ready illustration of the same doctrine. In such cases the underwriter necessarily reposes a trust and confidence in the insured, as to all facts and circumstances affecting the risk, which are peculiarly within his knowledge, and which are not of a public and general nature, or which the underwriter either knows, or is bound to know.[2] Indeed, most of the facts and circumstances, which may affect the risk, are generally within the knowledge of the insured only; and, therefore, the underwriter may be said emphatically to place trust and confidence in him as to all such matters. And, hence, the general principle is, that in all cases of insurance the insured is bound to communicate to the underwriter all facts and circumstances, material to the risk, within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract.[3]

§ 217. The same principle applies in all cases where the party is under an obligation to make a disclosure,

[1] Maltby's Case, cited 1 Dow, Parl. Cas. 294, 11 Wheaton, R. 68, note (*d*); Smith *v.* Bank of Scotland, 1 Dow, Parl Cas 272 See Etting *v.* Bank of United States, 11 Wheaton, R. 59

[2] Marshall on Insur B. 1, ch. 11, § 3

[3] Ibid, Lindenau *v.* Desborough, 8 B & Cressw. 586, 592, 2 Kent, Comm Lect 39, p. 488, note (4th edit) — It has been remarked by Lord Eldon, that concealment is of different natures, an intentional concealment, and an actual concealment, where there may be an obligation not to conceal, even if a disclosure is not required. Walker *v.* Symonds, 3 Swanst R. 62.

and conceals material facts. Therefore, if a release is obtained from a party in ignorance of material facts, which it is the duty of the other side to disclose, the release will be held invalid.[1] So, in cases of family agreements and compromises, if there is any concealment of material facts, the compromise will be held invalid, upon the ground of mutual trust and confidence reposed between the parties.[2] And, in like manner, if a devisee, by concealing from the heir the fact that the will has not been duly executed, procures from the latter a release of his title, pretending that it will facilitate the raising of money to pay the testator's debts, the release will be void on account of the fraudulent concealment.[3]

§ 218. But by far the most comprehensive class of cases of undue concealment arises from some peculiar relation, or fiduciary character between the parties. Among this class of cases are to be found those which arise from the relation of Client and Attorney, Principal and Agent, Principal and Surety, Landlord and Tenant, Parent and Child, Guardian and Ward, Ancestor and Heir, Husband and Wife, Trustee and Cestui que Trust, Executors or Administrators and Creditors, Legatees or Distributees, Appointor and Appointee under Powers, and Partners and Part-owners. In these, and the like cases, the law, in order to prevent undue advantage, from the unlimited confidence, affection, or sense of duty, which the rela-

[1] Bowles *v.* Stewart, 1 Sch. & Lefr. 209, 224; Broderick *v.* Broderick, 1 P. Will. 240; Ante, § 147, 148, 196, 197; see Roddy *v.* Williams, 3 Jones & Lat. 1.

[2] Gordon *v.* Gordon, 3 Swanst. R. 399, 463, 467, 470, 473, 476, 477, Leonard *v.* Leonard, 2 B. & Beatt. R. 171, 180, 181, 182.

[3] Broderick *v.* Broderick, 1 P. Will. 239, 240.

tion naturally creates, requires the utmost degree of good faith, (*uberrima fides,*) in all transactions between the parties. If there is any misrepresentation, or any concealment of a material fact, or any just suspicion of artifice or undue influence, Courts of Equity will interpose, and pronounce the transaction void, and, as far as possible, restore the parties to their original rights.[1]

§ 219. This subject will naturally come in review in a subsequent page, when we come to consider what may be deemed the peculiar equities between parties in these predicaments, and the guards which are interposed by the Law, by way of prohibition upon their transactions.[2] It may suffice here, merely by way of illustration, to suggest a few applications of the doctrine. Thus, for instance, if an attorney, employed by the party, should designedly conceal from his client a material fact or principle of law, by which he should gain an interest not intended by the client, it will be held a positive fraud, and he will be treated as a mere trustee for the benefit of his client and his representatives. And, in a case of this sort, it will not be permitted to the attorney to set up his ignorance of law or his negligence, as a defence or an excuse. It has been justly remarked, that it would be too dangerous to the interests of mankind, to allow those who are bound to advise, and who ought to be able to give good and sound advice, to take advantage of their own professional ignorance to the prejudice of others.[3] Attorneys must,

[1] See Ormond *v.* Hutchinson, 13 Ves. 51; Beaumont *v.* Boultbee, 5 Ves. 485; Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 558, 560, 561.

[2] Post, § 308 to 328.

[3] See Lord Eldon's judgment in the House of Lords, in Bulkley *v.* Wilford, 2 Clark & Finn. R. 102, 177 to 181, 183; Post, § 311.

from the nature of the relation, be held bound to give all the information which they ought to give, and not be permitted to plead ignorance of that which they ought to know.[1]

§ 220. In like manner, a trustee cannot, by the suppression of a fact, entitle himself to a benefit, to the prejudice of his *cestui que trust*. Thus, a creditor of the husband concealing the fact, cannot, by procuring himself, by such concealment, to be appointed the trustee of the wife, entitle himself to deduct his debt from the trust fund against the wife or her representatives, or even against the person in whose favor, and at whose instance, he has made the suppression.[2] So, if a partner, who exclusively superintends the business and accounts of the concern, should, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void.[3]

§ 221. Having taken this general notice of cases of fraud, arising from the misrepresentation or concealment of material facts; we may now pass to the consideration of some others, which, in a moral, as well as in a legal view, seem to fall under the same predicament, that of being deemed cases of actual, intentional fraud, as contradistinguished from constructive or legal fraud. In this class may properly be included all cases of unconscientious advantages in bargains, obtained by

[1] See Lord Eldon's judgment, &c., ibid.

[2] Dalbiac *v.* Dalbiac, 16 Ves. 115, 124; Neville *v.* Wilkinson, 1 Bro. Ch. R. 543; Post, § 321.

[3] Maddeford *v.* Austwick, 1 Sim. R. 89. See Smith *in re* Hay, 6 Madd. R. 2.

imposition, circumvention, surprise, and undue influence, over persons in general; and, in an especial manner, all unconscientious advantages or bargains, obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of, or protecting their own rights and interests.[1]

§ 222. The general theory of the law, in regard to acts done and contracts made by parties, affecting their rights and interests is, that in all such cases there must be a free and full consent to bind the parties. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.[2] And, therefore, it has been well remarked by an able commentator upon the law of nature and nations, that every true consent supposes three things: first, a physical power; secondly, a moral power; and, thirdly, a serious and free use of them.[3] And Grotius has added, that what is not done with a deliberate mind does not come under the class of perfect obligations.[4] And hence it is, that, if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For, although the law will not generally examine into the wisdom or prudence of men in disposing of their property, or in binding themselves by contracts, or by other acts, yet it will not suffer them to be entrapped by the fraudulent

[1] See Gartside v. Isherwood, 1 Brown, Ch. R. 358, 360, 361.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 3; Grotius de Jure Belli, Lib. 2, ch. 11, § 5.

[3] Puffendorf, Law of Nat. and Nations, Barbeyrac's note 1, B. 3, ch. 6, § 3, cited 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (a).

[4] Grotius de Jure Belli et Pacis, Lib. 2, ch. 11, § 4

contrivances, or cunning, or deceitful management of those who purposely mislead them.[1]

§ 223. It is upon this general ground, that there is a want of rational and deliberate consent, that the contracts and other acts of idiots, lunatics, and other persons, *non compotes mentis*, are generally deemed to be invalid in Courts of Equity.[2] Grotius has, with great propriety, insisted, that it is a part of the law of nature; for (says he) the use of reason is the first requisite to constitute the obligation of a promise, which idiots, madmen, and infants, are consequently incapable of making. *Primum requiritur usus rationis; ideo, et furiosi, et amentis, et infantis nulla est promissio.*[3] The Civil Law has emphatically adopted the same principle. *Furiosus* (say the Institutes) *nullum negotium gerere potest, quia non intelligit, quod agit.*[4] And afterwards, in the same work, distinguishing infants from pupils (technically so called), the Civil Law proceeds to declare, that infants are in the like situation as madmen; *Nam infans, et qui infantiæ proximus est, non multum a furioso distant; quia hujus modi ætatis pupilli nullum habent intellectum.*[5]

§ 224. The doctrine laid down in the older writers upon the Common Law, is not materially different. Bracton says: *Furiosus autem stipulari non potest, nec*

[1] See Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*), (*u*); Id. § 8; Warner *v.* Daniels, 1 Wood. & Min. 103.

[2] [As to want of consent arising from partial insanity, monomania, delusion, &c., see Waring *v.* Waring, 12 Jurist, 947; 6 Moore, P. C. 341. See, also, Creagh *v.* Blood, 2 Jones & Lat. 509.]

[3] De Jure Belli, Grotius, B. 2, ch. 11, § 5.

[4] Inst. Lib. 3, tit. 20, § 8; Dig. Lib. 50, tit. 17, l. 5, l. 40.

[5] Inst. Lib. 3, tit. 20, § 10; Dig. Lib. 50, tit. 17, l. 5, l. 40; 1 Domat, B. 1, tit. 2, § 1, art. 11, 12. See Ersk. Inst. B. 1, tit. 7, § 51, p. 160; B. 3, tit. 1, § 15, p. 485.

aliquod negotium agere, quia non intelligit, quid agit. Eodem modo, nec infans, vel qui infanti proximus est, et qui multum a furioso non distat, nisi hoc fiat ad commodum suum et cum tutoris auctoritate.[1] And Fleta repeatedly uses language to the same effect.[2]

§ 225. Yet, clear as this doctrine appears, in common sense and common justice, it has met with a sturdy opposition from the Common Lawyers, who have insisted (as has been justly remarked), in defiance of natural justice, and the universal practice of all the civilized nations in the world,[3] that, according to a known maxim of the Common Law, no man of full age should be admitted to disable or stultify himself; and that a Court of Equity could not relieve against a maxim of the Common Law.[4] And a distinction has been taken between the party himself, and his privies in blood (heirs) and privies in representation (executors and administrators.) For it has not been doubted, that privies in blood and privies in representation might, after the death of the insane party, avoid his contract, or other acts, upon the ground that he was *non compos mentis*.[5] How so absurd and mischievous a maxim

[1] Bracton, Lib. 3, ch 2, § 8, p. 100.

[2] Fleta, Lib. 2, ch. 56, § 19; Id Lib. 3, ch. 3, § 10; Beverley's case, 1 Co R. 126.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 1.

[4] See Sugden on Powers, ch. 7, § 1. — The best defence of the maxim which I have seen, is in 3 Bac. Abridg. Idiots and Lunatics F, where it is put upon the ground of public policy to favor alienations. Yet it seems wholly unsatisfactory in principle. Mr. Evans has exposed the absurdity of the maxim in a few striking remarks in his note to Pothier on Oblig. vol. 2, App No. 3, p. 28.

[5] Co. Litt. 247, a. b.; Beverley's case, 1 Co. R. 123, 124; 2 Black. Comm. 291, 292; 1 Fonbl. B. 1, ch. 2, § 1, and note (*h*), Shelford on Lunatics, ch 6, § 2, p. 255, 263; Newland on Contracts, ch. 1, p. 19; Sugden on Powers, ch. 7, § 1.

could have found its way into any system of jurisprudence, professing to act upon civilized beings, is a matter of wonder and humiliation.[1] There have been many struggles against it by eminent lawyers in all ages of the Common Law; but it is, perhaps, somewhat difficult to resist the authorities, which assert its establishment in the fundamentals of the Common Law;[2] a circumstance which may well abate the boast, so often and so rashly made, that the Common Law is the perfection of human reason. Even the Courts of Equity in England have been so far regardful of the maxim, that they have hesitated to retain a bill to examine the

[1] See Evans's note, 2 Pothier on Oblig. App. No. 3, p. 28.

[2] 3 Black. Comm. 291, 292; 1 Fonbl. Eq. B. 1, ch. 2, § 1, and note (*d*); Co. Litt. 217; Beverley's case, 4 Co R. 123; Yates *v.* Boen, 2 Str. R. 1101. See Shelford on Lunatics, ch. 6, § 2, p. 263; ch. 9, § 2, p. 407, &c.; Baxter *v.* Portsmouth, 7 Dowl. & Ryl. 618; S. C. 5 Barn. & Cressw. 170; Brown *v.* Joddrell, 3 Carr. & Payne, 30; Newland on Contracts, ch. 1, p. 15 to 21. — The subject is a good deal discussed by Mr. Justice Blackstone in his Commentaries, who does not attempt to disguise its gross injustice. (2 Black. Com. 291, 292.) It is also fully discussed by Mr. Fonblanque, in his learned notes, (1 Fonbl. Eq. B. 1, ch. 2, § 1, and notes *a* to *l*); and by Lord Coke in his Commentary on Littleton (Co. Litt. 217, a and b,) who adheres firmly to it (as we should expect) as a maxim of the Common Law. See, also, Beverley's case, (5 Co. R. 123, and Shelford on Lunatics, ch. 6, § 1, 2, p. 242, 255; ch. 9, § 2, p. 407, &c.) In America this maxim has not been of universal adoption in the State Courts; if, indeed, it has ever been recognized as binding, in any of the Courts of Common Law. See Somes *v.* Skinner, 16 Mass. R. 348; Webster *v.* Woodford, 3 Day, R. 90, 100; Mitchell *v.* Kingman, 5 Pick. R. 431; Lang *v.* Whidden, 2 N. H. 135. In modern times, the English Courts of Law seem to be disposed, as far as possible, to escape from the maxim. Baxter *v.* Earl of Portsmouth, 5 Barn. & Cressw. 170; S. C. 7 Dowl. & Ryl. 614; Ball *v.* Mannin, 3 Bligh, R. (new series) 1. And even in England, although the party himself could not set aside his own act, yet the king, as having the general custody of idiots and lunatics, might, by his attorney-general, on a bill, set aside the same acts. See 1 Fonbl. Eq. B. 1, ch. 2, § 2; Co. Litt. 247; Newland on Contracts, ch. 1, p. 15 to 21; Buller, N. Prius, 172.

point of lunacy;[1] although, when a party has been found a lunatic under an inquisition, they will entertain a bill, by his committee or guardian, to avoid all his acts from the time at which he has been found *non compos*.[2] And, formerly, they were so scrupulous in adhering to the maxim, that cases have occurred in which a lunatic was not allowed to be a party to a bill, to be relieved against an act done during his lunacy.[3] But this rule is now with great propriety abandoned.[4]

§ 226. The true and only rational exposition of the maxim (which has been adopted by Courts of Equity) is, that the maxim is to be understood of acts done by the lunatic in prejudice of others; as to which he shall not be permitted to excuse himself from civil responsibility on pretence of lunacy; and it is not to be understood of acts, done to the prejudice of himself; for this can have no foundation in reason and natural justice.[5]

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 1, note (*e*); cites Tothill, R. 130. See, also, 1 Eq Abridg. 278, B. 1.

[2] 1 Fonbl Eq. B. 1, ch. 2, § 1, note (*e*); 1 Eq. Abridg. 278, B. 2; Addison *v.* Dawson, 2 Vern. 678; S. C. 1 Eq Abridg. B. 1; Newland on Contracts, c. 1, p. 17 to 21.

[3] Attorney-General *v.* Parkhurst, 1 Cas. Ch. 112. See also Attorney-General *v.* Woolrich, 1 Cas Ch 153 — Some acts of a lunatic are, by the Common Law, deemed voidable, and some void. Where the estate passes by his own hand, as by livery of seisin, there it is voidable; where by a deed, and the conveyance does not pass by his own hand, it is void. For example, a surrender by deed of a *non compos* tenant for life will not bar a contingent remainder. 1 Fonbl. Eq. B. 1, ch. 2, § 1; 1 Eq. Abridg. 278, B. 3; Thompson *v.* Leach, 3 Mod. R. 301; 1 Ld. Ray. 313; 2 Salk. 427, Shower, Parl. Cas. 150; 3 Lev. R. 284. See Shelford on Lunatics, ch. 6, § 2, p. 555, &c.

[4] See Ridler *v* Ridler, 1 Eq. Abridg. 278, 279, B. 5; Addison *v.* Dawson, 2 Vern. R. 678; Clerk *v.* Clerk, 2 Vern. R. 412; Shelford on Lunatics, ch. 10, § 2, p. 415, &c.; Newland on Contracts, ch. 1, p. 17 to 19; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*n*).

[5] 1 Fonbl. Eq. B. 1, ch. 2, § 2; Ridler *v.* Ridler, 1 Eq. Abridg. 279, B. 5;

§ 227. The ground, upon which Courts of Equity now interfere, to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise *non compotes mentis*, is fraud. Such persons being incapable in point of capacity to enter into any valid contract, or to do any valid act, every person dealing with them, knowing their incapacity, is deemed to perpetrate a meditated fraud upon them and their rights. And, surely, if there be a single case in which all the ingredients, proper to constitute a genuine fraud, are to be found, it must be a case where these unfortunate persons are the victims of the cunning, the avarice, and corrupt influence of those, who would make an inhuman profit from their calamities. Even Courts of Law now lend an indulgent ear to cases of defence against contracts of this nature; and, if the fraud is made out, will declare them invalid.[1]

§ 228. But Courts of Equity deal with the subject

3 Bac. Abridg. Idiots and Lunatics, C. F. In discussing the subject of Idiots and Lunatics, and persons *non compotes mentis*, in this place, it is important to state, that it is not intended to examine the nature and history of the jurisdiction of the Court of Chancery, or rather of the Chancellor personally, as the special delegate of the Crown, over idiots, lunatics, and other persons *non compotes* generally. That is a subject of a widely different character from the one now before us; for here the Court of Chancery acts upon its general principles, in setting aside the contracts and acts of such persons, upon the ground of fraud, circumvention, imposition, and undue advantage taken of them. The jurisdiction of the Crown, as *parens patriæ*, to take care of idiots, lunatics, and other persons *non compotes*, is given at considerable length in Jeremy on Eq. Jurisd. B. 1, ch. 4, p. 210; 2 Madd. Ch. Pr. ch. 4, p. 565; 2 Fonbl. Eq. Pt. 2, ch. 2, § 1, and note (*g*); 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*e*). See also Beverley's case, 4 Co. R. 124; 2 Story on Equity Jurisp. § 1362 to 1365.

[1] Yates *v.* Boen, 2 Str. R. 1104; Baxter *v.* Earl of Portsmouth, 5 B. & Cressw. 170; S. C. 7 Dowl. & Ryland, 618; Faulder *v.* Silk, 3 Camp. R. 126; Brown *v.* Joddrell, 1 Mood & Malk. 105; S. C. 3 Carr. & Payne, 30; Levy *v.* Barker, 1 Mood. & Malk. 106, and note (*b*).

upon the most enlightened principles; and watch with the most jealous care every attempt to deal with persons *non compotes mentis*. Wherever, from the nature of the transaction, there is not evidence of entire good faith, (*uberrimæ fidei*) or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests.[1] Where, indeed, a contract is entered into with good faith, and is for the benefit of such persons, such as for necessaries, there Courts of Equity will uphold it, as well as Courts of Law.[2] And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, Courts of Equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo*, or in the state in which they were before the purchase.[3]

§ 229. And not only may contracts and deeds of a person *non compos* be thus set aside for fraud, but other instruments and acts of the most solemn nature, even of record, such as fines levied, and recoveries suffered by such a person, may in effect be overthrown in Equity, although held binding at law.[4] For, although

[1] See Selby *v.* Jackson, 13 Law J. Rep. (N. S.) Chanc. 219.

[2] Baxter *v.* Earl of Portsmouth, 5 B. & Cressw. 170; S. C. 7 Dow. & Ryl. R. 614, 618, Hallett *v.* Oakes, 1 Cush. 296, McCrillis *v.* Bartlett, 8 N. H. R. 569; Seaver *v.* Phelps, 11 Pick. 304; Fitzgerard *v.* Reed, 9 Sm. & Mar. 91. See, also, Ex parte Hall, 7 Ves. 264; Nelson *v.* Duncombe, 9 Beav. 211.

[3] Neill *v.* Morley, 9 Ves. 478, 482; Sergeson *v.* Sealy, 2 Atk. 412; Carr *v.* Holliday, 5 Iredell, Eq. R. 167, Price *v.* Barington, 7 Eng. Law & Eq. R. 254. See Molton *v.* Camroux, 2 Exch. R. 487; S. C. 4 Exch. R. 17.

[4] See Mansfield's case, 12 Co. R. 123, 124. But at law the king might

Courts of Equity will not venture to declare such fines and recoveries utterly void, and vacate them, yet they will decree a reconveyance of the estate to the party prejudiced, and hold the conusee of the fine, and the demandant in the recovery, to be a trustee for the same party.[1]

§ 230. Lord Coke has enumerated four different classes of persons who are deemed in law to be *non compotes mentis*. The first is an idiot, or fool natural; the second is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus, qui gaudet lucidis intervallis*, and sometimes is of a good and sound memory, and sometimes *non compos mentis*; and the fourth is a *non compos mentis* by his own act, as a drunkard.[2] In respect to the last class of persons, although it is regularly true, that drunkenness doth not extenuate any act or offence, committed by any person against the laws; but it rather aggravates it, and he shall gain no privilege thereby;[3]

avoid the fine or recovery by a *scire facias*, during the lifetime of the idiot. 1 Fonbl. Eq. B. 1, ch. 2, § 2; Beverley's case, 4 Co. R. 124, 126, *b*; Tourson's case, 8 Co. R. 338; 3 Bac. Abridg. *Idiots and Lunatics*, C. and F.

[1] See Addison *v.* Dawson, 2 Vern. 678; Welby *v.* Welby, Tothill, R. 164; Wright *v.* Booth, Tothill, R. 166; Shelford on Lunatics, ch. 6, § 1, p. 252; 1 Fonbl. Eq. B. 1, ch. 2, § 2, and note (*k*); Wilkinson *v.* Brayfield, 2 Vern. 307. See Clark *v.* Ward, Preced. Chan. 150; Ferres *v.* Ferres, 2 Eq. Abrid. 695; 3 Bac. Abrid. *Idiots and Lunatics*, F. What circumstances afford proofs or presumptions of insanity, are not fit topics for discussion in this place, but more properly belong to a treatise on Medical Jurisprudence. There are many reported cases in which the subject is discussed with great ability and acuteness. See Shelford on Lunatics, ch. 2, p. 35 to 74; Attorney-General *v.* Parnther, 3 Bro. Ch. R. 441; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*x*). See also Mr. Evans's note to 2 Pothier on Oblig. No. 3, p. 25.

[2] Beverley's case, 4 Co. R. 124; Co. Litt. 247, a.

[3] Ibid.; 4 Black. Comm. 25; 3 Bac. Abridg. *Idiots and Lunatics*, A.

and although, in strictness of law, the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*;[1] yet Courts of Equity will relieve against acts done, and contracts made by him, while under this temporary insanity, where they are procured by the fraud or imposition of the other party.[2] For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of Courts of Equity against his own grossly immoral and fraudulent conduct.[3]

§ 231. But to set aside any act or contract on account of drunkenness, it is not sufficient, that the party is under undue excitement from liquor.[4] It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case there can in no just sense be said to be a serious and deliberate consent on his part; and without this, no contract or other act can or ought to be binding by the law of nature.[5] If

[1] 3 Bac. Abridg. *Idiots and Lunatics*, A.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 3; Johnson *v.* Medlicott, cited 3 P. Will 130, note (A); Cooley *v.* Ranken, 11 Miss. 642.

[3] See Cook *v.* Clayworth, 18 Ves. 12; Calloway *v.* Witherspoon, 5 Iredell, Eq. R. 128. The maxim has sometimes been laid down, *Qui peccat ebrius, luat sobrius*. Hendrick *v.* Hopkins, Cary, R. 93. But even at law, drunkenness is a good defence against a deed executed by a party when so drunk that he does not know what he is doing. Cole *v.* Robins, Bull. N. P. 172. Gore *v.* Gibson, 13 M. & W. 623; Burrett *v.* Buxton, 2 Atkens, 167. See 2 Shelford on Lunatics, ch. 7, p. 276; Id. 301.

[4] Pittinger *v.* Pittinger, 2 Green, Ch. R. 156. See Crane *v.* Conklin, Saxton, Ch. R. 346, Hutchinson *v.* Tindal, 2 Green, Ch. R. 357.

[5] 1 Fonbl. Eq. B. 1, ch. 2, § 3; Cook *v.* Clayworth, 18 Ves. 12, Reynolds *v.* Waller, 1 Wash. R. 207; Rutherford *v.* Ruff, 1 Dessaus. R. 350; Wade *v.* Colvert, 2 Rep. Const. Ct. 27; Peyton *v.* Rawlins, 1 Hayw. 77. Sir Joseph Jekyll is said to have intimated an opinion, that the having been in drink is not any reason to relieve a man against any

there be not that degree of excessive drunkenness, then Courts of Equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink,[1] or some unfair advantage taken of his intoxication, to obtain an unreasonable bargain or benefit from him.[2] For, in general, Courts of Equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance or some imposition practised.[3]

deed or agreement gained from him to encourage drunkenness. *Scrus*, if through the management or contrivance of him who gained the deed, &c., the party from whom the deed has been gained was drawn in to drink. Johnson *v.* Medlicott, 1731, cited 3 P. Will. 130, note A. But this distinction seems wholly unsatisfactory, for in each case it is the fraud of the party who obtained the deed or agreement which constitutes the ground of declaring it invalid, and the fraud is in morals and common sense the same, whether the drunken party has been enticed into the drunkenness, or becomes the victim of the cunning of another, who takes advantage of his mental incapacity. The case of Cook *v.* Clayworth, (18 Ves. 12,) requires no such distinction, where the circumstances indicate fraud. In this last case, Sir William Grant said: "As to that extreme state of intoxication, that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition." See, also, Cole *v.* Robins, Buller, N. P. 172, Wigglesworth *v.* Steers, 1 Hen. & Munf. 70.

[1] Hotchkiss *v.* Fortson, 7 Yerg. 67; Harvey *v.* Peaks, 1 Munf. 519.

[2] Cook *v.* Clayworth, 18 Ves. 12; Say *v.* Barwick, 1 Ves. & Beames, 195; Campbell *v.* Catcham, 1 Bibb, R. 406, White *v.* Cox, 3 Hayw. R. 82; Wigglesworth *v.* Steers, 1 Hen. & Munf 70; Taylor *v.* Patrick, 1 Bibb, R. 168.

[3] Cook *v.* Clayworth, 18 Ves. 12; Newland on Contracts, ch. 22, p. 365, Rich *v.* Sydenham, 1 Ch. Cas. 202.

§ 232. It is upon this special ground that Courts of Equity have acted in cases where a broader principle has sometimes been supposed to have been upheld. They have, indeed, indirectly, by refusing relief, sustained agreements, which have been fairly entered into, although the party was intoxicated at the time.[1] And, especially, they have refused relief where the agreement was to settle a family dispute, and was in itself reasonable.[2] But they have not gone the length of giving a positive sanction to such agreements, so entered into, by enforcing them against the party, or in any other manner than by refusing to interfere in his favor against them.[3]

§ 233. In regard to drunkenness, the writers upon natural and public law adopt it, as a general principle, that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void; because they are incapable of any deliberate consent, in like manner as persons who are insane, or *non compotes mentis*. The rule is so laid down by Heineccius,[4] and Puffendorf.[5] It is adopted by Pothier, one of the purest of jurists, as an axiom which requires no illustration.[6] Heineccius, in discussing the subject, has made some sensible observations. Either (says he) the drunkenness of the party entering into a contract, is excessive or moderate. If moderate, and it did not

[1] Cook v. Clayworth 18 Ves 12 See, also, 5 Barn & Cresw 170

[2] Corry v Corry, 1 Ves R 19 See Stockley v Stockley, 18 Ves R 30, Dunnage v White, 1 Swanst. R. 137, 150.

[3] See Cragg v Holme, cited 18 Ves 14, and note (C) at the Rolls, 1811.

[4] Heinecc. Elem Jur Natur Lib 1, ch 14, § 392, and note, ibid

[5] Puffend Law of Nat and Nat. B 1, ch 1, § 8.

[6] Pothier Traite des Oblig. n. 49 See also 2 Evans, Pothier on Oblig. No 3, p. 28

quite so much obscure his understanding, as that he was ignorant with whom or for what he had contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail to be perceived; and, therefore, the party dealing with him must have been engaged in a manifest fraud; or, at least, he ought to impute it to his own fault, that he had dealt with a person in such a situation.[1] The Scottish Law seems to have adopted this distinction; for by that law persons in a state of absolute drunkenness, and consequently deprived of reason, cannot bind themselves by any contracts. But a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling contracts.[2]

§ 234. Closely allied to the foregoing are cases, where a person, although not positively *non compos*, or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence. And it is quite immaterial from what cause such weakness arises; whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, or constitutional despondency, or overwhelming calamities. For it has been well remarked, that, although there is no direct proof that a man is *non compos*, or delirious, yet, if he is a man of weak understanding, and is harassed and uneasy at the time, or if the deed is executed by him *in extremis*, or when he is a paralytic, it cannot be supposed that he

[1] Heinecc. Juris. Nat. Lib. 1, ch. 11, § 392, note.

[2] Erskine, Inst. B. 1, tit. 1, § 15, p. 485; 1 Madd. Ch. Pr. 239; 1 Stair, Inst. B. 1, tit. 10, § 13; 2 Stair, Inst. B. 4, tit. 20, § 49.

had a mind adequate to the business which he was about, and he might be very easily imposed upon.[1]

§ 235. It has, indeed, been said by a learned Judge, that if a weak man give a bond, and there be no fraud or breach of trust in the obtaining of it, equity will not set aside the bond only for the weakness of the obligor, if he be *compos mentis*; neither will a Court of Equity measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity.[2] But whatever weight there may be in this remark, in a general sense, it is obvious that weakness of understanding must constitute a most material ingredient in examining whether a bond or other contract has been obtained by fraud, or imposition, or undue influence; for, although a contract, made by a man of sound mind and fair understanding, may not be set aside, merely from its being a rash, improvident, or hard bargain; yet, if the same contract be made with a person of weak understanding, there does arise a natural inference, that it was obtained by fraud, or circumvention, or undue influence.[3]

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 3.

[2] Sir Joseph Jekyll, in Osmond *v.* Fitzroy, 3 P. Will. 129, 130. See, also, ex parte Allen, 15 Mass. R. 58.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*), Blackford *v.* Christian, 1 Knapp, R. 73, 77, Clarkson *v.* Hanway, 2 P. Will. 203, Gartside *v.* Isherwood, 1 Bro. Ch. R. Appendix, 559, 560, 561. — Lord Thurlow is said to have remarked, in Griffin *v.* De Veulle, (3 Wooddes. Lect. App. 16,) that he admitted, "That this Court would not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, for these reasons merely, where no fraud appears, as was laid down by Sir Joseph Jekyll, in Osmond *v.* Fitzroy, 3 P. Will. 130. But he said, that Sir Joseph Jekyll might have been pleased to add, that from these ingredients there might be made out and evidenced a collection of facts, that there was fraud and misrepresentation used."

§ 236. It has been asserted by another eminent Judge, that it is not sufficient to set aside an agreement in a Court of Equity, to suggest weakness and indiscretion in one of the parties, who has engaged in it; for, supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, Equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means, made use of to draw him into such an agreement.[1] But this language, if maintainable at all, requires many qualifications; for, if a person is of a feeble understanding, and the bargain is unconscionable, what better proof can one wish of its being obtained by fraud, or imposition, or undue influence, or by the power of the strong over the weak?[2]

The case of Osmond v. Fitzroy cannot be supported but upon the mixed ground of Lord Southampton's extreme weakness of understanding, as well as the situation of Osmond." And in Mr. Cox's note to 3 P. Will. 131, he is represented to have stated, "That in almost every case upon this subject, a principal ingredient was a degree of weakness, short of a legal incapacity." Mr. Maddock seems to think, that Osmond v. Fitzroy went principally upon the ground of the relation between the parties, (servant and master); and he holds the doctrine of Sir Joseph Jekyll the most conformable to the authorities. 1 Madd. Ch. Pr. 224, 225. See Stock on Lunacy.

[1] Lord Hardwicke, in Willis v. Jernegan, 2 Atk. R. 251.

[2] See Malin v. Malin, 2 Johns. Ch. R. 238; Shelford on Lunatics, ch. 6, § 3, p. 258, 267, 268, 272; White v. Small, 2 Ch. Cas. 103; Bridgman v. Green, 2 Ves. 627; Clarkson v. Hanway, 2 P. Will. 203; Bennett v. Wade, 2 Atk. 325, 529; Nantes v. Corrick, 9 Ves. 181, 182; Willan v. Willan, 16 Ves. 72; Blackford v. Christian, 1 Knapp, R. 73 to 87; Griffith v. Robbins, 3 Madd. R. 191; Ball v. Mannin, 3 Bligh, R. 1, (new series); S. C. 1 Dow, R. 392, (new series); 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (k); Fillmer v. Gott, 7 Bro. Par. R. 70; Dodds v. Wilson, 1 Rep. Const. Ct. of S. Car. 448; Newland on Contracts, ch. 22, p. 362; Gartside v. Isherwood, 1 Bro. Ch. R. 558, 560, 561. — In truth, there was not the slightest proof of any weakness of understanding of the party in the case

§ 237. The language of another eminent Judge, in a very recent case, is far more satisfactory and comprehensive, and applies a mode of reasoning to the subject compatible at once with the dictates of common sense and legal exactness and propriety. "The law," (said Lord Wynford,) "will not assist a man, who is capable of taking care of his own interest, except in cases where he has been imposed upon by deceit, against which ordinary prudence could not protect him. If a person of ordinary understanding, on whom no fraud has been practised, makes an imprudent bargain, no Court of Justice can release him from it.[1] Inadequacy of consideration is not a substantial ground for setting aside a conveyance of property. Indeed, from the fluctuation of prices, owing principally to the gambling spirit of speculation that now unhappily prevails, it would be difficult to determine, what is an adequate price for any thing sold. At the time of the sale the buyer properly calculates on a rise in the value of the article bought, of which he would have the advantage. He must not, therefore, complain, if his speculations are disappointed, and he becomes a loser, instead of a gainer by his bargain. But those who, from imbecility

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of Willis *v.* Jernegan, 2 Atk. 251; but merely of a sanguine and ardent temper and imagination, speculating with rashness upon the hope of imaginary profits. And, indeed, it appears, that the speculation might have been profitable, but for the party's insisting upon an exorbitant premium for the lottery tickets, until the market had fallen. The weakness alluded to in this case by Lord Hardwicke, was probably not so much incapacity of mind as credulity or want of judgment; for he expressly negatives any fraud or imposition. See Lord Eldon's remarks in Huguenin *v.* Basley, 14 Ves. 290; Fox *v.* Macreth, 2 Bro. Ch. R. 420; 2 Hovend. Suppt. 113, note to 9 Ves. 182; Shelf. on Lunatics, Introd. § 2, p. 36, &c.; Id. ch. 2, § 3, p. 265, 267, 268, 272. See also Lewis *v.* Read, 1 Ves. jr. 19; 1 Fonbl. Eq. B. 1, ch. 2, § 3, and note (*r*); Harvey *v.* Mount, 8 Ves. 439.

[1] See Warner *v.* Daniels, 1 Wood. & Min. 103.

of mind, are incapable of taking care of themselves, are under the special protection of the law. The strongest mind cannot always contend with deceit and falsehood. A bargain, therefore, into which a weak one is drawn, under the influence of either of these, ought not to be held valid, for the law requires that good faith should be observed in all transactions between man and man." And, addressing himself to the case before him, he added, "If this conveyance could be impeached on the ground of the imbecility of F., only, a sufficient case has not been made out to render it invalid; for the imbecility must be such as would justify a jury, under a commission of lunacy, in putting his property and person under the protection of the Chancellor. But a degree of weakness of intellect, far below that which would justify such a proceeding, coupled with other circumstances, to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed."[1]

§ 238. The doctrine, therefore, may be laid down as generally true, "that the acts and contracts of persons who are of weak understandings,[2] and who are thereby liable to imposition, will be held void in Courts of Equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence."[3] [But the simple fact that the

[1] Blackford *v.* Christian, 1 Knapp, R. 77. See Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 560, 561.

[2] See Hunt *v.* Moore, 2 Barr, 105.

[3] See Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 560, 561; Rippy *v.* Grant, 4 Ired. Eq. R. 443. — In the Treatise on Equity, (1 Fonbl. Eq. B 1, ch. 2, § 3,) it is laid down that the protection of Courts of Equity

intellectual capacity of one party to a contract is below that of the average of mankind, does not alone furnish sufficient ground for setting aside the contract.[1]] The rule of the Common Law seems to have gone further in cases of wills (for, it is said, that, perhaps, it can hardly be extended to deeds without circumstances of fraud or imposition); since the Common Law requires that a person, to dispose of his property by will, should be of sound and disposing memory,[2] which imports that the testator should have understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, actions, and behavior at the time, and not merely from his being able to give a plain answer to a common question.[3] But, as fraud in regard to the making of wills of real estate belongs in a peculiar manner to Courts of Law,[4] and fraud in regard to personal estate to the Ecclesiastical Courts, although sometimes relievable in Equity, that part of the subject seems more proper to be discussed in a different treatise.[5]

"is not to be extended to every person of a weak understanding, unless there be some fraud or surprise; for Courts of Equity would have enough to do if they were to examine into the wisdom and prudence of men in disposing of their estates. Let a man be wise, therefore, or unwise, if he be legally *compos mentis*, he is a disposer of his property, and his will stands instead of a reason. S. P. Bath and Montague's case, 3 Ch. Cas. 107.

[1] Mann *v.* Botterly, 21 Verm. R. 326.

[2] [See the late case of Waring *v.* Waring, 6 Moore, P. C. R. 341, where the subject is ably examined.]

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 3, and note (*u*) and (*x*), Donegal's case, 2 Ves. R. 107, 408; Attorney-General *v.* Parmenter, 3 Brown, Ch. R. 411; Id. 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*r*).

[4] See Gould *v.* Gould, 3 Story, R. 537.

[5] 1 Fonbl. Eq. B. 1, ch. 2, § 3, and notes (*u*) and (*r*); Ante, § 184; Allen *v.* Macpherson, 5 Beavan, R. 469; S. C. on appeal, 1 Phillips, Ch. R. 133.

§ 239. Cases of an analogous nature may easily be put, where the party is subjected to undue influence, although in other respects of competent understanding.[1] As, where he does an act, or makes a contract, when he is under duress, or the influence of extreme terror, or of threats, or of apprehensions short of duress. For, in cases of this sort, he has no free will, but stands *in vinculis*. And the constant rule in Equity is, that, where a party is not a free agent, and is not equal to protecting himself, the Court will protect him.[2] The maxim of the Common Law is: *Quod aliàs bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.*[3] On this account Courts of Equity watch with extreme jealousy all contracts made by a party while under imprisonment; and, if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside.[4] Circumstances, also, of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may, in like manner, so entirely overcome his free agency as to justify the Court in setting aside a contract made by him, on account of

[1] See Debenham *v.* Ox, 1 Ves. 276; Cory *v.* Cory, 1 Ves. 19; Young *v.* Peachy, 2 Atk. 251; 1 Madd. Ch. Pr. 215, 216; Whitehorn *v.* Hines, 1 Munf. 557; Gest *v.* Frazier, 2 Litt. 778; Branch *v.* Hurst, 3 Dessaus. 273; McCormick *v.* Malin, 5 Blackf. 509.

[2] Evans *v.* Llewellyn, 1 Cox, R. 340; Crome *v.* Ballard, 1 Ves. jr. 215, 220; Hawes *v.* Wyatt, 3 Bro. Ch. R. 158; Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 1; 2 Eq. Abridg. 183, pl. 2; Gilb. Eq. R. 9; 3 P. Will. 294, note *E*; Attorney-General *v.* Southen, 2 Vern. R. 497.

[3] 3 Co. R. 78.

[4] Roy *v.* Duke of Beaufort, 2 Atk. 190; Nichols *v.* Nichols, 1 Atk. 409; Hinton *v.* Hinton, 2 Ves. 631, 635; Falkner *v.* O'Brien, 2 B. & Beatt. 214; Griffith *v.* Spratley, 1 Cox, R. 333; Underhill *v.* Harwood, 10 Ves. 219; Attorney-General *v.* Southen, 2 Vern. R. 197.

some oppression, or fraudulent advantage, or imposition, attendant upon it.[1]

[1] See Gould *v.* Okeden, 3 Bro. Parl. R. 560; Bosanquet *v.* Dashwood, Cas. Temp. Talbot, 37; Proof *v.* Hines, Cas. T. Talb. 111; Hawes *v.* Wyatt, 3 Bro. Ch. R. 156; Picket *v.* Loggon, 14 Ves. 215; Beasley *v.* Maggreth, 2 Sch. & Lefr. 31, 35; Carpenter *v.* Elliot, cited 2 Ves. jr. 491; Farmer *v.* Farmer, 1 House of Lords Cases, 724; Wood *v.* Abrey, 3 Madd. R. 417; Ramsbottom *v.* Parker, 6 Madd. R. 6; Fitzgerald *v.* Rainsford, 1 B. & Beatt. R. 37, note (*d*); Underhill *v.* Harwood, 10 Ves. 219; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*e*); Crowe *v.* Ballard, 1 Ves. jr. 215, 220; Huguenin *v.* Basley, 14 Ves. 273; Newland on Contracts, ch. 22, p. 362, &c.; Ib. p. 365, &c. — The doctrine of the Common Law, upon the subject of avoiding contracts upon the ground of mental weakness, or force, or undue influence, does not seem, in any essential manner, to differ from that adopted in the Roman Law, or in the law of modern continental Europe. Thus, we find in the Roman Law, that contracts may be avoided, not only for incapacity but for mental imbecility, the use of force, or the want of liberty in regard to the party contracting. Ait Prætor, Quod metus causâ gestum erit, ratum non habebo. Dig. Lib. 4, tit 2, l. 1. But then the force, or fear, must be of such a nature as may well overcome a firm man. Metum accipiendum, Labeo dicit, non quemlibet timorem, sed majoris malitatis. Dig. Lib. 4, tit. 2, l. 5. The party must be intimidated by the apprehension of some serious evil of a present and pressing nature. Metum non vani hominis, sed qui merito et in hominem constantissimum cadat; Dig. Lib. 4, tit. 2, l. 6. He must act, Metu majoris malitatis; and feel, that it is immediate; Metum presentem accipere debemus, non suspicionem inferendi ejus. See Dig. Lib. 4, tit. 2, l. 9; 1 Domat. Civil Law, B. 1, tit. 18, § 2, art. 1 to 10. Pothier gives his assent to this general doctrine; but he deems the Civil Law too rigid in requiring the menace or force to be such as might intimidate a constant or firm man; and very properly thinks, that regard should be had to the age, sex, and condition of the parties. Pothier on Oblig. n. 25. Mr. Evans thinks that any contract produced by the actual intimidation of another, ought to be held void, whether it were the result of personal infirmity merely, or of such circumstances as might ordinarily produce the like effect upon others. 1 Evans, Pothier on Oblig. n. 25, note (*a*,) p 18. The Scottish Law seems to have followed out the line of reasoning of the Roman Law with a scrupulous deference and closeness. Ersk. Inst. B. 4, tit. 1, § 26. The Scottish Law also puts the case of imposition from weakness upon a clear ground. "Let one be ever so subject to imposition, yet, if he has understanding enough to save himself from a sentence of idiocy, the law makes him capable of managing his own affairs; and consequently his deeds, however hurtful they may be

§ 240. The acts and contracts of infants, that is, of all persons under twenty-one years of age, (who are by the Common Law deemed infants,) are *a fortiori*, treated as falling within the like predicament. For infants are by law generally treated as having no capacity to bind themselves, from the want of sufficient reason and discernment of understanding; and, therefore, their grants and those of lunatics are, in many respects, treated as parallel both in law and reason.[1] There are, indeed, certain excepted cases, in which infants are permitted by law to bind themselves by their acts and contracts. But these are all of a special nature; as, for instance, infants may bind themselves by a contract for necessaries, suitable to their degree and quality;[2] or by a contract of hiring and services for wages;[3] or by some act which the law requires them to do.[4] And, generally, infants are favored by the law, as well as by Equity, in all things which are for their benefit, and are saved from being prejudiced by any thing to their

to himself, must be effectual, unless evidence be brought, that they have been drawn, or extorted from him by unfair practices. Yet where lesion (injury) in the deed and facility in the grantor concur, the most slender circumstances of fraud or circumvention are sufficient to set it aside." Ersk. Inst. B. 4, tit. 1, § 27. Mr. Bell has also stated the same principle in the Scottish Law with great clearness. There may be in one of perfect age a degree of weakness, puerility, or prodigality, which, although not such as to justify a verdict of insanity, and place him under guardianship, as insane, may yet demand some protection for him against unequal or gratuitous alienation. 1 Bell, Comm. 139. See Harvey *v.* Mount, 8 Beavan, R. 439.

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 4.

[2] Zouch *v.* Parsons, 3 Burr. 1801; 1 Fonbl. Eq. B. 1, ch. 2, § 4, and notes (*y*) and (*a*); Co. Litt. 172 a.

[3] Wood *v.* Fenwick, 10 Mees. & Welsb. 195. [*Contra*, in America, Peters *v.* Lord, 18 Conn. 337; Bingham on Infancy, (Bennett's Ed.) p. 90, and note 3. And see Regina *v.* Lord, 12 Q. B. Rep. 757.]

[4] People *v.* Moores, 4 Denio, 518; McCall *v.* Parker, 13 Metc. 372.

disadvantage.[1] But this rule is designed as a shield for their own protection it is not allowed to operate; as a fraud or injustice to others; at least not where a Court of Equity has authority to reach it in cases of meditated fraud.[2]

§ 241. In regard to the acts of infants, some are voidable and some are void; and so, also, in regard to their contracts, some are voidable and some are void. Where they are utterly void, they are from the beginning mere nullities, and incapable of any operation. But where they are voidable, it is in the election of the infant to avoid them, or not, which he may do, when he arrives at full age. In this respect he is by law differently placed from idiots and lunatics; for the latter, as we have seen, are not, [in England] or at least may not, at law, be allowed to stultify themselves. But an infant may, at his coming of age, avoid or confirm any voidable act or contract at his pleasure. In general, where a contract may be for the benefit or to the prejudice of an infant, he may avoid it as well at law as in Equity. Where it can never be for his benefit, it is utterly void.[3] And in respect to the acts of infants of a more solemn nature, such as deeds, gifts, and grants, this distinction has been insisted on, that such as do take effect by delivery of his hand are voidable; but such as do not so take effect are void.[4]

§ 242. But, independently of these general grounds,

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 4, and notes (*y*) and (*a*).

[2] See 1 Fonbl. Eq. B. 1, ch. 2, § 4, note (*z*); Zouch *v.* Parsons, 3 Burr. 1802. 1 American Leading Cases, tit. Infancy.

[3] 1 Fonbl. Eq. B. 1, ch. 2, § 4, notes (*y*), (*z*), (*b*); Zouch *v.* Parsons, 3 Burr. 1801, 1807. 1 American Leading Cases, tit. Infancy.

[4] Zouch *v.* Parsons, 3 Burr. R. 1794; Perkins, § 12. See 8 American Jurist, 327 to 330.

it is clear, that contracts made and acts done by infants in favor of persons knowing their imbecility and want of discretion, and intending to take advantage of them, ought, upon general principles, to be held void, and set aside, on account of fraud, circumvention, imposition, or undue influence. And it is upon this ground of an inability to give a deliberate and binding consent, that the nullity of such acts and contracts is constantly put by publicists and civilians.[1] *Infans non multum a furioso distat.*

§ 243. In regard to *femes covert*, the case is still stronger; for, generally speaking, at law they have no capacity to do any acts, or to enter into any contracts; and such acts and contracts are treated as mere nullities. And, in this respect, Equity generally follows the law.[2] This disability of married women proceeds, it is said, upon the consideration, that, if they were allowed to bind themselves, the law having vested their property in their husbands, they would be liable on their engagements, without the means of answering them. And if they were allowed to bind their husbands, they might, by the abuse of such a power, involve their husbands and families in ruin.[3] But perhaps the more exact statement would be, that it is a fundamental policy of the Common Law, to allow no diversity of interests between husband and wife; and for this purpose it is necessary to take from the wife all power to act for herself without his consent; and to disable her, even with his consent (for her own protection against his influence) from becoming personally bound by any act or

[1] See Ante, § 222, 223; Ayliffe, Pand. B. 2, tit. 38, p. 216, 217.
[2] 1 Fonbl. Eq B. 1, ch. 2, § 6.
[3] 1 Fonbl. Eq. B 1, ch. 2, § 6, note (*h*).

contract whatsoever, done *in pais*.[1] Courts of Equity have, indeed, broken in upon this doctrine; and have, in many respects, treated the wife as capable of disposing of her own separate property, and of doing other acts, as if she were a *feme sole*.[2] In cases of this sort, the same principles will apply to the acts and contracts of a *feme covert*, as would apply to her as a *feme sole*, unless the circumstances give rise to the presumption of fraud, imposition, unconscionable advantage, or undue influence.[3]

§ 244. Of a kindred nature to the cases already considered, are cases of bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence. This is the sort of fraud to which Lord Hardwicke alluded, in the passage already cited,[4] when he said, that they were such bargains as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other, being inequitable and unconscientious bargains.[5] Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in

[1] See Comyns, Dig. *Baron and Feme*, D. 1, E. 1 to 3, H. N. O. P. Q.; Id. Chancery, 2 M. 1 to 16.

[2] See on this subject the learned notes of Mr. Fonblanque in 1 Fonbl. Eq. B. 1, ch. 2, § 6, notes (*h*) to (*s*); Clancy on Rights, &c., of Husband and Wife; and Roper on Husband and Wife; Com. Dig. Chancery, 2 M. 1 to 16.

[3] See 1 Fonbl. Eq. B. 1, ch. 2, § 8; Dalbiac *v.* Dalbiac, 16 Ves. 115.

[4] Ante, § 188; Mitf. Pl. Eq. by Jeremy, 132, 133, 134; Roosevelt *v.* Fulton, 2 Cowen, R. 129; McDonald *v.* Neilson, 2 Cowen, R. 139.

[5] Chesterfield *v.* Janssen, 2 Ves. 155; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*e*). Harvey *v.* Mount, 8 Beavan, R. 439.

Equity.[1] For Courts of Equity, as well as Courts of Law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations, not for Courts of Justice, but for the party himself to deliberate upon.

§ 245. Inadequacy of consideration is not, then, of itself, a distinct principle of relief in Equity. The

[1] Griffith v. Spratley, 1 Cox, R. 383; Copis v. Middleton, 2 Madd. R. 409; Collier v. Brown, 1 Cox, R. 428; Low v. Barchard, 8 Ves. 133; Western v. Russel, 3 Ves. & Beam. R. 187; Naylor v. Winch, 1 Sim. & Stu. R. 565; 1 Fonbl. Eq. B. 1, ch. 2, § 9, note (*d*); Osgood v. Franklin, 2 Johns. Ch. R. 1; Borell v. Dann, 2 Hare, R. 440, 450. In this case, Mr. Vice-Chancellor Wigram said: "Now with respect to the adequacy of the consideration alone, considered apart from the alleged improvidence in the manner of selling, I certainly understand the rule of the Court to be that, even in ordinary cases, and *a fortiori* in cases of sales by public auction, mere inadequacy of consideration is not a ground even for refusing a decree for specific performance of an unexecuted contract, (White v. Damon, Ex parte Latham,) and still less can it be a ground for rescinding an executed contract. The only exception which I believe can be stated, is, where the inadequacy of consideration is so gross, as of itself to prove fraud or imposition on the part of the purchaser. Fraud in the purchaser is of the essence of the objection to the contract in such a case. The case must, however, be strong indeed, in which a Court of Justice shall say, that a purchaser at a public auction, between whom and the vendors there has been no previous communication affecting the fairness of the sale, is chargeable with fraud or imposition, only because his bidding did not greatly exceed the amount of the vendor's reserved bidding. I am perfectly satisfied that the plaintiff's case cannot be sustained upon the ground of mere inadequacy. Another principle must be introduced. It must be made out that the assignees were guilty of a breach of trust in fixing so low a reserved bidding as £900; and (as I have already observed) that the purchaser was bound to have ascertained that a breach of trust had not been committed in that respect before he accepted the conveyance."

Common Law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce; and it admits of no precise standard. It must be in its nature fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. If Courts of Equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind.[1] Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief.

§ 246. Still, however, there may be such an unconscionableness or inadequacy in a bargain,[2] as to demonstrate some gross imposition or some undue influence,[3] and in such cases Courts of Equity ought to interfere, upon the satisfactory ground of fraud.[4] But then such unconscionableness or such inadequacy should be made out, as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud.[5] And where

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[1] Per Lord Ch. Baron Eyre, in Griffith *v.* Spratley, 1 Cox, R. 383; 1 Madd. Ch. Pr. 213, 214; Warner *v.* Daniels, 1 Wood. & Min. 110.

[2] See Hamet *v.* Dundass, 4 Barr. 178.

[3] See Barnett *v.* Spratt, 4 Iredell, Eq. R. 171.

[4] Ibid.; Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 558, 560, 561.

[5] Coles *v.* Trecothick, 9 Ves. 246; Underhill *v.* Harwood, 10 Ves. 219; Copis *v.* Middleton, 2 Madd. R. 409; Stillwell *v.* Wilkinson, Jacob, R.

there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud.[1]

§ 217. The difficulty of adopting any other rule, which would not, in the common intercourse and business of human life, be found productive of serious inconvenience and endless litigation, is conceded by Civilians and Publicists; and, for the most part, they seem silently to abandon cases of inadequacy in bargains where there is no fraud, to the forum of conscience, and morals, and religion. Thus, Domat, after remarking that the law of nature obliges us not to take advantage of the necessities of the seller, to buy at too low a price, adds: "But because of the difficulties in fixing the just price of things, and of the inconveniences, which would be too many and too great, if all sales were annulled, in which the things were not sold at their just value, the laws connive at the injustice of buyers, except in the sale of lands, where the price given for them is less than half of their value."[2] So that, in the Civil Law, sales of personal property are usually without redress; and even sales of immovable property are in the same predicament, unless the inadequacy of price amounts to

280; Peacock *v.* Evans, 16 Ves. 512; Gwynne *v.* Heaton, 1 Bro. Ch. R. 9; Osgood *v.* Franklin, 2 Johns. Ch. R. 1, 23; S. C. 11 Johns. R. 527.

[1] Ibid.; 1 Fonbl. Eq. B. 1, ch. 2, § 9; note (*c*); Id. § 10, and notes (*g*) and (*h*); Id. § 11; Id. ch. 4, § 26; 1 Madd. Ch. Pr. 212, 213, 211; Howe *v.* Wheldon, 2 Ves. 516, 518; Com. Dig. Chancery, 3 M. 1; Huguenin *v.* Basley, 14 Ves. 273.

[2] 1 Domat, Civil Law, B. 1, tit. 2, § 3, 9, art. 1. See also Heineccius, Elem. I. N. et G. § 352; Id. § 340.

one half the value; a rule purely artificial, and which must leave behind it many cases of gross hardship and unconscionable advantage. The Civil Law, therefore, in fixing a moiety, and confining it to immovable property, admits, in the most clear manner, the impracticability of providing for all cases of this nature. *Rem majoris pretii* (says the Code) *si tu, vel pater tuus minoris distraxerit; humanum est; ut vel pretium te restituente emptoribus, fundum venundatum recipias, auctoritate judicis intercedente; vel si emptor elegerit, quod deest justo pretio, recipias;*[1] thus laying down the broadest rule of Equity and morals, adapted to all cases. But the Lawgiver, struck with the unlimited nature of the proposition, immediately adds, in the same law, that the party shall not be deemed to have sold at an undervalue, unless it amounts to one half. *Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit;*[2] a logic not very clear or indisputable.[3] And yet the Civil Law was explicit enough in denouncing fraudulent bargains. *Si pater tuus per vim coactus domum vendidit; ratum non habebitur, quod non bonâ fide gestum est. Male fidei emptio irrita est.*[4] *Ad rescindendam venditionem, et male fidei probationem, hoc solum non sufficit, quod, magno pretio fundum comparatum, mi-*

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[1] Cod. Lib. 4, tit. 11, l. 2, Id. l. 9; Heinecc. Elem. J. N. and N. § 310, 352. Post, § 218.

[2] Cod. Lib. 4, tit. 11, l. 2, Id. l. 9, 1 Domat, Civil Law, B. 1, tit. 2, § 9; 1 Fonbl. Eq. B. 1, ch. 2, § 10, note (*l*).

[3] In another place the Civil Law, in relation to sales, seems plainly to wink out of sight the immorality of inadequate bargains. Quemadmodum in emendo et vendendo naturaliter concessum est, quod pluris sit, minoris emere, quod minoris sit, pluris vendere. Et ita invicem se circumscribere, ita in locationibus quoque et conditionibus juris est. Dig. Lib. 19, tit. 2, l. 22, § 3, 1 Domat, Civil Law, B. 1, tit. 18, p. 217.

[4] Cod. Lib. 4, tit. 44, l. 1, 4, 8.

noris distractum esse commemoras.[1] So that we see, in this last passage, the very elements of the doctrine of Equity on this subject.

§ 248. Pothier, too, of whom it has been remarked, that he is generally swayed by the purest morality, says, "Equity ought to preside in all agreements. Hence it follows, that, in contracts of mutual interest, where one of the contracting parties gives or does something, for the purpose of receiving something else, as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For, as Equity, in matters of commerce, consists in Equality, when that Equity is violated, as when one of the parties gives more than he receives, the contract is vicious for want of the Equity which ought to preside in it." He immediately adds, "Although any injury whatever renders contracts inequitable, and consequently vicious, and the principle of moral duty (*le for interieur*) induces the obligation of supplying the just price; yet persons of full age are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive; a rule wisely established for the security and liberty of commerce, which requires that a person shall not be easily permitted to defeat his agreements; otherwise we should not venture upon making any contract, for fear that the other party, imagining himself to be injured by the terms of it, would oblige us to follow it by a lawsuit. That injury is commonly deemed

[1] Cod. Lib. 4, tit. 44, l. 4; Id. l. 8, 10. See 1 Domat, B. 1, tit. 18. Vice of Covenants, p. 247.

excessive, which amounts to more than a moiety of the just price. And the person who has suffered such an injury may, within ten years, obtain letters of rescission for annulling the contract."[1]

§ 249. After such concessions, we may well rest satisfied with the practical convenience of the rule of the Common Law, which does not make the inequality of the bargain depend solely upon the price, but upon the other attendant circumstances, which demonstrate imposition, or some undue influence.[2] The Scottish Law has adopted the same practical doctrine.[3]

§ 250. This part of the subject may be concluded by the remark, that Courts of Equity will not relieve in all cases, even of very gross inadequacy, attended with circumstances which might otherwise induce them to act, if the parties cannot be placed *in statu quo*; as for instance, in cases of marriage settlements; for the Court cannot unmarry the parties.[4]

§ 251. Cases of surprise and sudden action without due deliberation, may properly be referred to the same head of fraud or imposition.[5] An undue advantage

[1] Pothier on Oblig. n. 33, 34, by Evans; Ante, § 247.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 10.

[3] Erskine, Inst. B. 1, tit. 1, § 27; Ante, § 247, note (2), p. 262.

[4] 1 Madd. Ch. Pr. 215; North *v.* Ansall, 2 P. Wms. 619.

[5] See ante, § 120, note (1), Howe *v.* Wheldon, 2 Ves. 516. — Mr Baron Powell, in the Earl of Bath and Montague's Case, (3 Ch. Cas. 76.) used the following language. "It is said, that this is a deed that was obtained by surprise and circumvention. Now, I perceive this word *surprise* is of a very large and general extent. They say, that if the deed be not read to or by the party, that is a surprise, nay, the mistake of a counsel that draws the deed, either in his recitals or other things, that is a surprise of a counsel, and the surprise of counsel must be interpreted the surprise of the client, &c. If these things be sufficient to let in a Court of Equity, to set aside deeds found by verdict to be good in law, then no man's property can be safe. I hardly know any surprise, that

is taken of the party under circumstance, which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning. It has been very justly remarked, by an eminent writer, that it is not every surprise which will avoid a deed duly made. Nor is it fitting, for it would occasion great uncertainty, and it would be impossible to fix what is meant by surprise; for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be.[1] The surprise here intended must be accompa-

should be sufficient to set aside a deed after a verdict, unless it be mixed up with fraud, and that expressly proved." Lord Chief Justice Treby, in the same case (p. 71) said: "As to the first point of surprise, &c., I confess I am still at a loss for the very notion of surprise; for I take it to be either falsehood or forgery, that is, though I take it, they would not use the word, in this case, fraud, if that be not the meaning of it, to be something done unawares, nor with all the precaution and deliberation, as possibly a deed may be done. Here was a case cited not long ago, &c., out of the Civil Law, about surprise, &c. A man was informed by his kinsman that his son was dead, and so got him to settle his estate upon him. This is called in the Civil Law, *surreptio*, &c. Now the civilians define that thus: Surreptio est cum per falsam rei narrationem aliquid, extorquetur, when a man will, by false suggestion, prevail upon another to do that which otherwise he would not have done. And I make no doubt, that Equity ought to set aside that; but then, this is probably called a fraud." See Lord Holt's opinion in the same case (p. 103). The Lord Keeper (Lord Somers) in the same case said (p. 111): "Now, for this word, *surprise*, it is a word of a general signification, so general and so uncertain, that it is impossible to fix it. A man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment as it ought to be. But I suppose the gentlemen, who use that word in this case, mean such surprise as is attended and accompanied with fraud and circumvention. Such a surprise may, indeed, be a good ground to set aside a deed so obtained, in Equity, and hath been so in all times. *But any other surprise never was*, and I hope never will be, because it will introduce such a wild uncertainty in the decrees and judgments of the Court, as will be of greater consequence than the relief in any case will answer for." See ante, § 120, note (1).

[1] 1 Fonbl. Eq. B. 1, ch. 2, § 8.

nied with fraud and circumvention,[1] or at least by such circumstances, as demonstrate that the party had no opportunity to use suitable deliberation, or that there was some influence or management to mislead him. If proper time is not allowed to the party, and he acts improvidently, if he is importunately pressed, if those in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences, but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called upon to act, in circumstances of sudden emergency, or unexpected right or acquisition; in these and many like cases, if there has been great inequality in the bargain, Courts of Equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage.[2]

§ 252. Many other cases might be put, illustrative of what is denominated actual or positive fraud.[3] Among these, are cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others;[4] fraudulent awards, with an intent to do injustice;[5] fraudulent and illusory appointments and revocations, under powers;[6] fraudulent prevention of acts to be done for the benefit

[1] Ibid.; 1 Madd. Ch. Prac. 212, 213, 214.

[2] Evans *v.* Llewellyn, 1 Cox, R. 139, 440; S. C. 1 Bro. Ch R. 150; Irnham *v.* Child, 1 Bro. Ch. R. 92; Townshend *v.* Stangroom, 6 Ves. 338, Picket *v.* Loggon, 14 Ves. 215.

[3] See Com. Dig. Chancery, 3 M. 1, &c.

[4] 1 Madd. Ch. Pr. 255 to 260; Bowles *v.* Stewart, 1 Sch. & Lefr. 222, 225; Dormer *v.* Fortescue, 3 Atk. 124; Eyton *v.* Eyton, 2 Vern. 280; Dalton *v.* Coatsworth, 1 P. Will. 733.

[5] 1 Madd. Ch. Pr. 233, 234; Brown *v.* Brown, 1 Vern. 157, and Mr. Raithby's note (1), 159; Com. Dig. Chancery, 2 K. 6; Champion *v.* Wenham, Ambl. R. 245.

[6] 1 Madd. Ch. Pr. 216 to 252.

of others, under false statements or false promises;[1] frauds in relation to trusts of a secret or special nature;[2] frauds in verdicts, judgments, decrees, and other judicial proceedings;[3] frauds in the confusion of boundaries of estates, and matters of partition and dower;[4] frauds in the administration of charities;[5] and frauds upon creditors, and other persons, standing upon a like Equity.[6]

§ 253. Some of the cases, falling under each of these heads, belong to that large class of frauds commonly called constructive frauds, which will naturally find a place in our future pages. But, as it is the object of these Commentaries, not merely to treat of questions of relief, but also of principles of jurisdiction, a few instances will be here adduced as examples of both species of fraud.

§ 254. In the first place, as to the suppression and destruction of deeds and wills, and other instruments. If an heir should suppress them, in order to prevent another party, as a grantee or a devisee, from obtaining the estate vested in him thereby, Courts of Equity,

[1] 1 Madd. Ch. Pr. 252, 253, Luttrell v. Lord Waltham, 11 Ves. 200, Jones v. Martin, 6 Bro. Parl. Cas. 137; 5 Ves. 266, note; 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (q); Id. B. 1, ch. 4, § 25, and notes; 2 Chance on Powers, ch. 23, § 3, art. 3015 to 3025, Sugden on Powers, ch. 6, § 2, p. 377 to 387, (3d edit.)

[2] 2 Madd. Ch. Pr. 97, 98; 1 Hovenden on Frauds, ch. 13, p. 168, &c., Dalbiac v. Dalbiac, 16 Ves. 124.

[3] 1 Madd. Ch. Pr. 236, 237; Com. Dig. Chancery, 3 M. 1, 3 N. 1, 3 W.; Davenport v. Stafford, 8 Beavan's R. 503, Langley v. Fisher, 9 Beavan's R. 90.

[4] 1 Madd. Ch. Pr. 237; Mitf. Eq. Pl. 117; 1 Hovenden on Frauds, ch. 8, p. 239; Id. ch. 9, p. 214.

[5] 2 Hovend. on Frauds, ch. 28, p. 288.

[6] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 411, &c.; 1 Fonbl. Eq. B. 1, ch. 4, § 12, 13, 14, and notes; Com. Dig. Chancery, 3 M. 4; Jones v. Martin, 6 Bro. Parl. Cas. 437; 5 Ves. 266, note.

upon due proof by other evidence, would grant relief, and perpetuate the possession and enjoyment of the estate in such grantee or devisee.[1] For cases for relief

[1] See ante, § 184, and note; Post, § 440; 1 Fonbl. Eq. B. 1, ch. 2, § 3, note (*u*); Hunt *v.* Matthews, 1 Vern. R. 408: Wardour *v.* Binsford, 1 Vern. R. 452; 2 P. Will. 718, 749; Dalton *v.* Coatsworth, 1 P. Will. 731; Woodreff *v.* Barton, 1 P. Will. 734; Finch *v.* Newnham, 2 Vern. 216; Hampden *v.* Hampden, 1 Bro. Parl. Cas. 250; S. C. cited, 1 P. Will. 733; Barnesley *v.* Powell, 1 Ves. R. 119, 284, 289; Tucker *v.* Phipps, 3 Atk. R. 360. In this last case Lord Hardwicke said: "In this court the rule is not to allow a suit against an executor for a legacy, before a probate of the will; but, in the present case, the plaintiff ought not to be put to the difficulty of going into the spiritual court to cite the defendant, because that would be giving the defendant a great advantage from his own bad acts in destroying or suppressing the will; for here the *spoliation* is, I think, proved so sufficiently as to entitle the plaintiff to come here in the first instance for a decree. As to *the spoliation*, consider it generally as a personal legacy, where the will is destroyed or concealed by the executor, and, I think, in such a case, if the *spoliation* is proved plainly (though the general rule is to cite the executor into the ecclesiastical court), the legatee may properly come here for a decree upon the head of *spoliation* and *suppression*. There are several cases, where, if *spoliation* or *suppression* are proved, it will change the jurisdiction, and give this court a jurisdiction which it had not originally; as in the case of Lord Hunsdon, Hobb. 109, where the title was a title merely at law, yet there being a suppression of the deeds under which that title accrued, the plaintiff had a decree here for possession, and quiet enjoyment. As the jurisdiction may be changed with regard to a court of law, why may it not with regard to the spiritual court? and I think the case of Weeks *v.* Weeks, which came before me some time ago, an authority that it may: here the *spoliation* or *suppression* is certainly fraudulent, voluntary, and malicious, and, therefore, differs from the case of Pascall *v.* Pickering, where the *spoliation* did by no means appear to be fraudulent or malicious, but rather inadvertently done, and without any bad design. I think in such cases of malicious and fraudulent *spoliations*, the court will not put the plaintiff under the difficulty of going into the ecclesiastical court, where he must meet with much more difficulty than proving the contents of a deed at law, which has been lost or secreted. For in the spiritual court the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, which will be a difficulty almost insuperable, and which courts of law do not put a person upon doing; the plaintiff must also prove the whole will, though the remainder of it does not at all belong to

against spoliation come in a favorable light before Courts of Equity, *in odium spoliatoris*; and where the contents of a suppressed or destroyed instrument are proved, the party (as he ought) will receive the same benefit as if the instrument were produced.[1]

§ 255. In the next place, frauds in regard to powers of appointment. A person, having a power of appointment for the benefit of others, shall not, by any contrivance, use it for his own benefit. Thus, if a parent has a power to appoint to such of his children as he may choose, he shall not, by exercising it in favor of a child in a consumption, gain the benefit of it himself, or by a secret agreement with a child, in whose favor he makes it, derive a beneficial interest from the execution of it.[2] The same rule applies to cases where a parent, having a power to appoint among his children, makes an illusory appointment, by giving to one child a nomi-

or regard his legacy. I think, if this had been a mere personal legacy, the court, under the circumstances of this case, ought to interpose, and the rather, because, in bringing suits against an executor, this court goes further in requiring a probate than courts at law. But here the case is stronger to entitle the plaintiff to a decree, because the legacy is out of real and personal estate both, and as to the real estate, there is no occasion to prove the will in the spiritual court, to entitle the legatee to recover his legacy out of the real estate. This would be clearly the case, where the charge is only upon the real estate, and though the heir is entitled to have the personal estate to exonerate his real, yet, if he is made executor, and has, by a voluntary and fraudulent act, put the legatee under such difficulties as make it almost impossible for him to prove the will, it is reasonable to let in the legatee to have his legacy, and leave the executor to pay himself out of the personal estate."

[1] Saltern *v.* Melhuish, Ambler, R. 247; Cowper *v.* Cowper, 2 P. Will. 748, &c.; Rex *v.* Arundel, Hob. R. 109, Hampden *v.* Hampden, 1 P. Will. 733; 1 Bro. Parl. Cas. 550; Bowles *v.* Stewart, 1 Sch & Lefr. 225.

[2] McQueen *v.* Farquhar, 11 Ves. 479; Meyn *v.* Belcher, 1 Eden, R 138, Palmer *v.* Wheeler, 2 Ball & Beatt. 18; Sugden on Powers, ch. 7, § 2, Morris *v.* Clarkson, 1 Jac. & Walk. 111.

nal and not a substantial share; for, in such a case, Courts of Equity will treat the execution as a fraud upon the power.[1]

§ 256. In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of Equity hold themselves entirely competent to take from third persons, and *à fortiori*, from the party himself, the benefit which he may have derived from his own fraud, imposition or undue influence, in procuring the suppression of such acts.[2] Thus, where a person had fraudulently prevented another, upon his death-bed, from suffering a recovery at law, with a view that the estate might devolve upon another person, with whom he was connected; it was adjudged, that the estate ought to be held as if the recovery had been perfected, and that it was against conscience to suffer it to remain where it was.[3] So, if a testator should communicate his intention to a devisee, of charging a legacy on his estate, and the devisee should tell him that it is unnecessary, and he will pay it, the legacy being thus prevented, the devisee will be charged with the payment.[4] And, where a party procures a testator to make a new will, appointing him as executor, and

[1] Sugden on Powers, ch 7, § 2; ch. 9, § 1, Butcher *v.* Butcher, 9 Ves. 382, 2 Hovend on Frauds, ch. 23, p. 230, &c., 1 Madd. Ch. Pr 216 to 252, Campbell *v.* Home, 1 Younge & Coll. N. R. Ch. 664.

[2] Bridgman *v.* Green, 2 Ves. R. 627; Huguenin *v.* Basley, 14 Ves. 289, Ante, § 252; Post, § 768.

[3] Luttrell *v.* Lord Waltham, cited 14 Ves. 290, S C. 11 Ves. 638.

[4] Cited in Mestaer *v.* Gillespie, 11 Ves 638. See Goss *v.* Tracey, 1 P Will 288, 2 Vern. 700; Thynn *v.* Thynn, 1 Vern. 296; Resch *v.* Kennigate, Ambler, R 67, Chamberlain *v.* Agar, 2 Ves. & B. 259; Drakeford *v.* Walker, 3 Atk. 530, Blair *v.* Bromley, 2 Phillips, Ch. R. 354.

agrees to hold the property in trust for the use of an intended legatee, he will be held a trustee for the latter, upon the like ground of fraud.[1]

§ 257. We may close this head of positive or actual fraud, by referring to another class of frauds, of a very peculiar and distinct character. Gifts and legacies are often bestowed upon persons, upon condition that they shall not marry without the consent of parents, guardians, or other confidental persons. And the question has sometimes occurred, how far Courts of Equity can or ought to interfere, where such consent is fraudulently withheld by the proper party, for the express purpose of defeating the gift or legacy, or of insisting upon some private and selfish advantage, or from motives of a corrupt, unreasonable, or vicious nature. The doctrine now firmly established upon this subject is, that Courts of Equity will not suffer the manifest object of the condition to be defeated by the fraud, or dishonest, corrupt, or unreasonable refusal of the party whose consent is required to the marriage.[2] It is, indeed, a very delicate and difficult duty to be performed by such Courts. But to permit a different rule to prevail, would be to encourage frauds, and to enable a party to withhold consent upon grounds utterly wrong, or upon motives grossly corrupt and unreasonable.

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[1] Thynn *v.* Thynn, 1 Vern. 296; Reach *v.* Kennigate, Ambler, R. 67, Bevenish *v.* Barnes, Prec. Ch. 3; Oldham *v.* Litchfield, 2 Vern. R. 501; Barrow *v.* Greenough, 3 Ves. 152; Chamberlain *v.* Agar, 2 Ves. & B. 262; Whittor *v.* Russell, 1 Atk. R. 448. See also cases in note (*a*) to 3 Ves. 39.

[2] Peyton *v.* Bury, 2 P. Will. 625, 628; Eastland *v.* Reynolds, 1 Dick. R. 317; Goldsmid *v.* Goldsmid, 19 Ves. 368, Strange *v.* Smith, Ambler, R. 263; Clarke *v.* Parkins, 19 Ves. 1, 12; Mesgrett *v.* Mesgrett, 2 Vern. R. 580; Merry *v.* Ryves, 1 Eden, R. 1, 4.

CHAPTER VII.

CONSTRUCTIVE FRAUD.

§ 258. HAVING thus considered some of the most important cases of actual, or meditated and intentional fraud, in which Courts of Equity are accustomed to administer a plenary jurisdiction for relief, we may now pass to another class of frauds, which, as contradistinguished from the former, are treated as legal, or constructive frauds. By constructive frauds are meant such acts or contracts, as, although not originating in any actual evil design, or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law, as within the same reason and mischief, as acts and contracts done *malo animo*. Although, at first view, the doctrines on this subject may seem to be of an artificial, if not of an arbitrary character; yet, upon closer observation, they will be perceived to be founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice, after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they suppress the temptations and encouragements, which might otherwise be found too strong for their virtue.

§ 259. Some of the cases under this head are principally so treated, because they are contrary to some general public policy, or to some fixed artificial policy of the law. Others, again, rather grow out of some special confidential or fiduciary relation between all the parties, or between some of them, which is watched with especial jealousy and solicitude, because it affords the power and the means of taking undue advantage, or of exercising undue influence over others. And others, again, are of a mixed character, combining, in some degree, the ingredients of the preceding with others of a peculiar nature; but they are chiefly prohibited, because they operate substantially as a fraud upon the private rights, interests, duties, or intentions of third persons, or unconscientiously compromit, or injuriously affect, the private interests, rights, or duties of the parties themselves.

§ 260. And, in the first place, let us consider the cases of constructive fraud, which are so denominated on account of their being contrary to some general public policy, or fixed artificial policy of the law.[1] Among these may properly be placed contracts and agreements respecting marriage, (commonly called marriage brokage contracts,) by which a party engages to give another a compensation, if he will negotiate an advantageous marriage for him. The Civil Law does not seem to have held contracts of this sort in such severe rebuke; for it allowed *proxenetæ*, or match-makers, to receive a reward for their services,

[1] See Mr. Cox's note to Osmond *v.* Fitzroy, 3 P. Will. 131; Newland on Contracts, ch. 33, p. 469, &c. — By being contrary to public policy, we are to understand that, in the sense of the law, they are injurious to, or subversive of, the public interests. See Chesterfield *v.* Janssen, 1 Atk 352; S. C. 2 Ves. 125.

to a limited extent.[1] And the period is comparatively modern, in which a different doctrine was engrafted into the Common Law, and received the high sanction of the House of Lords.[2]

§ 261. The ground, upon which Courts of Equity interfere in cases of this sort, is not upon any notion of damage to the individuals concerned, but from considerations of public policy.[3] Marriages of a suitable nature, and upon the fairest choice, are of the deepest importance to the well-being of society; since upon the equality, and mutual affection, and good faith of the parties, much of their happiness, sound morality, and mutual confidence must depend. And upon these only can dependence be placed for the due nurture, education, and solid principles of their children. Hence, every temptation to the exercise of an undue

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[1] Cod. Lib. 5, tit. 1, l. 6.

[2] Hall and Kean v. Potter, 3 P. Will. 76; 1 Eq. Cas. Abridg. 89, P.: S. C. 3 Lev. 411; Show. Parl. Cas. 76; 1 Fonbl. Eq. B. 1, ch. 4, § 10; Grisley v. Lother, Hob. R. 10; Law v. Law, Cas. temp. Talb. 140, 112; Vauxhall Bridge Company v. Spencer, Jac. R. 67. — In Boynton v. Hubbard, 7 Mass. R. 112, Mr. Chief Justice Parsons said: "We do not recollect a contract which is relieved against in Chancery, as originally against public policy, which has been sanctioned in Courts of Law, as legally obligatory on the parties. For although it has been said in Chancery, that marriage brokage bonds are good at law, but void in Equity, yet no case has been found at law in which those bonds have been holden good." But see Grisley v. Lother, Hob. R. 10, and a case cited in Hall v. Potter, 3 Levinz, R. 411, 412; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (r).

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (r); Newland on Contracts, ch. 33, p. 169 to 172. — "Marriage brokage bonds, which are not fraudulent on either party, are yet void, because they are a fraud on third persons, and a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends, and they are relieved against, as a general mischief, for the sake of the public. Per Parsons, Ch. Just. in Boynton v. Hubbard, 7 Mass. 112.

influence, or a seductive interest, in procuring a marriage, should be suppressed; since there is infinite danger that it may, under the disguise of friendship, confidence, flattery, or falsehood, accomplish the ruin of the hopes and fortunes of most deserving persons, and especially of females. The natural consequence of allowing any validity to contracts of marriage brokage would be, to introduce improvident, ill-advised, and often fraudulent matches, in which advantage would be taken of youth and inexperience, and warm and generous affections. And the parties would be led on, until they would become the victims of a sordid cunning, and be betrayed into a surrender of all their temporal happiness; and thus, perhaps, be generally prepared to sink down into gross vice, and an abandonment of conjugal duties. Indeed, contracts of this sort have been not inaptly called a sort of kidnapping into a state of conjugal servitude;[1] and no acts of the parties can make them valid in a Court of Equity.[2]

§ 262. The public policy of thus protecting ignorant and credulous persons from being the victims of secret contracts of this sort, would seem to be as perfectly clear as any question of this nature well can be. And the surprise is, not that the doctrine should have been established in a refined, enlightened, and Christian country, but that its propriety should ever have been made matter of debate. It is one of the innumerable instances, in which the persuasive morality of Courts of Equity has subdued the narrow,

[1] Drury v. Hooke, 1 Vern. 412.

[2] Shirley v. Martin, cited by Mr. Cox, in 3 P. Will. 75, S. C. 1 Bal & Beatty, 357, 358.

cold, and semi-barbarous dogmas of the Common Law. The Roman Law, while it admitted the validity of such contracts in a qualified form, had motives for such an indulgence, founded upon its own system of conjugal rights, duties, and obligations, very different from what, in our age, would be deemed either safe, or just, or even worthy of toleration.

§ 263. Be the foundation of the doctrine, however, what it may, it is now firmly established, that all such marriage brokage contracts are utterly void, as against public policy;[1] so much so that they are deemed incapable of confirmation;[2] and even money paid under them may be recovered back again in a Court of Equity.[3] Nor will it make any difference, that the marriage is between persons of equal rank, and fortune, and age; for the contract is equally open to objection upon general principles, as being of dangerous consequence.[4] Indeed, some writers treat contracts of this sort as involving considerations of turpitude, and entitled to be classed with others of a highly vicious nature.[5]

§ 264. The doctrine has gone even farther, and,

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[1] Arundel v. Trevillian, Rep. Ch. 37 [87]; Drury v. Hooke, 1 Vern. R. 412; Hall v. Potter, 3 Lev. 411; S. C. Shower, Parl. Cas. 76; Cole v. Gibson, 1 Ves. 507; Debonham v. Ox, 1 Ves. 276; Smith v. Aykehill, 3 Atk. 566; Hylton v. Hylton, 2 Ves. 548, Stibblehill v. Brett, 2 Vern. 116; S. C. Prec. Ch. 165; 1 Bro. Parl. Cas. 57; Roberts v. Roberts, 3 P. Will. 74, note (1); Id. 75, 76; Law v. Law, 3 P. Will. 391, 394, Williamson v. Gihon, 2 Sch. & Lefr. 357; 1 Eq. Cas. Abridg. 98, F.

[2] Cole v. Gibson, 1 Ves. 503, 506, 507; 1 Fonbl. Eq. B. 1, ch. 4. § 10, note (s); Roberts v. Roberts, 3 P. Will. 74, and Cox's note (1).

[3] Smith v. Bruning, 2 Vern. 392; 1 Fonbl. Eq. B. 1. ch. 4, § 10; Goldsmith v. Bruning, 1 Eq. Abridg. 89, F.

[4] 1 Fonbl. Eq. B. 1, ch. 4, § 10; Newland on Contracts, ch. 33, p. 170, 171.

[5] Newland on Contracts, ch. 33, p. 469.

with a view to suppress all undue influence and improper management, it has been held that a bond, given to the obligee, as a remuneration for having assisted the obligor in an elopement and marriage without the consent of friends, is void, even though it is given voluntarily after the marriage, and without any previous agreement for the purposes; for it may operate an injury to the wife, as well as give encouragement to a grossly iniquitous transaction, calculated to disturb the peace of families, and to involve them in irremediable distress.[1] It approaches, indeed, very nearly to the case of a premium in favor of seduction.

§ 265. Of a kindred nature, and governed by the same rules, are cases where bonds are given, or other agreements made, as a reward for using influence and power over another person, to induce him to make a will in favor of the obligor, and for his benefit; for all such contracts tend to the deceit and injury of third persons, and encourage artifices and improper attempts to control the exercise of their free judgment.[2] But such cases are carefully to be distinguished from those in which there is an agreement among heirs, or other near relatives, to share the estate equally between them, whatever may be the will made by the testator; for such an agreement is generally made to suppress fraud and undue influence, and cannot truly be said to disappoint the testator's intention, if he does not impose any restriction upon his devisee.[3]

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[1] Williamson *v.* Gihon, 2 Sch. & Lefr. 356, 362.

[2] Debonham *v.* Ox, 1 Ves. 276.

[3] Beckley *v.* Newland, 2 P. Will. 181; Harwood *v.* Tooker, 2 Sim. R. 192, Wethered *v.* Wethered, Id. 183; Post, § 785.

§ 266. Upon a similar ground, secret contracts made with parents, or guardians, or other guardians, standing in a peculiar relation to the party, whereby, upon a treaty of marriage, they are to receive a compensation, or security, or benefit for promoting the marriage, or giving their consent to it, are held void. They are in effect equivalent to contracts of bargain and sale of children and other relatives; and of the same public mischievous tendency as marriage brokage contracts.[1] They are underhand agreements, subversive of the due rights of the parties; and operating as a fraud upon those to whom they are unknown, and yet whose interests are controlled or sacrificed by them. And as marriages are of public concern, and ought to be encouraged, so nothing can more promote this end, than open and public agreements on marriage treaties, and the discountenance of all others, which secretly impair them.[2]

§ 267. Thus, where a bond was taken by a father from his son, upon his marriage, it was held void, as being obtained by undue influence, or undue parental awe.[3] So, where a party, upon his marriage with the daughter of A., gave the latter a bond for a sum of money, (in effect a part of his wife's portion on the marriage,) in order to obtain his consent to the marriage, it was

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 10; Keat *v.* Allen, 2 Vern. R. 388; S. C. Prec. Ch. 267, 1 Madd. Ch. Pr. 231, 232.

[2] Roberts *v.* Roberts, 3 P. Will. 74, and Mr. Cox's note (1); Payton *v.* Bladwell, 1 Vern. R. 240; Redman *v.* Redman, 1 Vern. R. 348; Gale *v.* Lindo, 1 Vern. R. 475; Cole *v.* Gibson, 1 Ves. 503; Morrison *v.* Arbuthnot, 1 Bro. Ch. R. 547. note; S. C. 8 Bro. Parl. Cas. 247 (by Tomlins); 1 Fonbl. Eq. B. 1, ch. 1, § 10, 11.

[3] 1 Fonbl. Eq. B. 1, ch. 1, § 10, 11; Williamson *v.* Gihon, 2 Sch. & Lefr. 362; Anon. 2 Eq. Abr. 187.

held utterly void.[1] So, where, upon a marriage, a settlement was agreed to be of certain property by relations on each side; and, after the marriage, one of the parties procured an underhand agreement from the husband to defeat the settlement in part; it was set aside, and the original settlement carried into full effect.[2] In all these and the like cases, Courts of Equity proceed upon the broad and general ground, that that which is the open and public treaty and agreement upon marriage, shall not be lessened, or in any way infringed by any private treaty or agreement.[3] The latter is a meditated fraud upon innocent parties, and upon this account properly held invalid. But it has a higher foundation in the security which it is designed to throw round the contract of marriage, by placing all parties upon the basis of good faith, mutual confidence, and equality of condition.[4]

§ 268. The same principle pervades the class of cases where persons, upon a treaty of marriage, by any concealment, or misrepresentation, mislead other parties, or do acts, which are by other secret agreements reduced to mere forms, or become inoperative. In all cases of such agreements, relief will, upon the same enlightened public policy, be granted to the injured parties. For Equity insists upon principles of the purest good faith; and nothing could be more subversive of it, than to

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[1] Keat *v.* Allen, 2 Vern. R. 588; 1 Fonbl. Eq. B. 1, ch. 4, § 11; 1 Eq. Cas. Abr. 90, F. 5.

[2] Payton *v.* Bladwell, 1 Vern. R. 210; Stribblehill *v.* Brett, 2 Vern. R. 445; Prec. in Ch. 165.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 11; 1 Eq. Cas. Abr. 90, F. 5, 6.

[4] Lamlee *v.* Hanman, 2 Vern. 499, 500; Pitcairne *v.* Ogbourne, 2 Ves. Sen. 375; Neville *v.* Wilkinson, 1 Bro. Ch. R. 543, 547; 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note (*x*).

allow parties, by holding out false colors, to escape from their own solemn engagements.[1]

§ 269. Thus, where a parent declined to consent to a marriage with the intended husband, on account of his being in debt; and the brother of the latter gave a bond for the debt, to procure such consent; and the intended husband then gave a secret counter bond to his brother, to indemnify him against the first; and the marriage proceeded upon the faith of the extinguishment of the debt; the counter bond so given was treated as a fraud upon the marriage (*contra fidem tabularum nuptialium*); and all parties were held entitled, as if it had not been given.[2]

§ 270. So, where a parent, upon a marriage of his son, made a settlement of an annuity or rent charge upon the wife, in full of her jointure; and the son secretly gave a bond of indemnity, of the same date, to his parent, against the annuity or rent charge; it was held void, as a fraud upon the faith of the marriage contract; for it affected to put the female party contracting for marriage, in one situation by the articles, and, in fact, put her in another and worse situation by a private agreement.[3] So, where a brother, on the marriage of his sister, let her have a sum of money privately, that her fortune might appear to be as much as was insisted on by the other side, and the sister gave a

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 11, and note; Lamlee *v.* Hanman, 2 Vern. 499; McNeil *v.* Cahill, 2 Bligh, R. 228; England *v.* Downs, 2 Beavan, R. 522.

[2] Redman *v.* Redman, 1 Vern. 318; Scott *v.* Scott, 1 Cox, R. 366; Turton *v.* Benson, 1 P. Will. 496; Morrison *v.* Arbuthnot, 8 Brown, Parl. Cases, p. 247, by Tomlins; 1 Bro. Ch. R. 447, note.

[3] Palmer *v.* Neave, 11 Ves. 165; Scott *v.* Scott, 1 Cox, R. 366, 378; Lamlee *v.* Hanman, 2 Vern. 466.

bond to the brother to repay it; the bond was set aside.[1]

§ 271. And where, upon a treaty of marriage, a party, to whom the intended husband was indebted, concealed his own debt, and misrepresented to the wife's father the amount of the husband's debts, the transaction was treated as a fraud upon the marriage; and the creditor was prevented by injunction from enforcing his debt, although it did not appear that there was any actual stipulation on the part of the wife's father, in respect to the amount of the husband's debts.[2] Upon this occasion the Lord Chancellor said: "The principle on which all these cases have been decided, is, that faith in such contracts is so essential to the happiness both of the parents and children, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it.[3] Nay, he shall be obliged to make his representation good, and the parties shall be placed in the same situation as if he had been scrupulously exact in the performance of his duty."[4]

§ 272. In all these cases, and those of a like nature, the distinct ground of relief is the meditated fraud or

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[1] Gale *v.* Lindo, 2 Vern. 475; Lamlee *v.* Hanman, 2 Vern. 199, 1 Fonbl. Eq. B. 1, ch. 2, § 11.

[2] Neville *v.* Wilkinson, 1 Bro. Ch. R. 513; S. C. 3 P. Will. 71, Mr. Cox's note; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*x*); 3 Ves. 461; 16 Ves. 125.

[3] Ibid. See also Montefiori *v.* Montefiori, 1 W. Black. R. 363; S. C. cited 1 Bro. Ch. R. 518.

[4] Ibid. See also Thompson *v.* Harrison, 1 Cox, R. 344; Eastabrook *v.* Scott, 3 Ves. 461; Scott *v.* Scott, 1 Cox, R. 366; Hunsden *v.* Cheyney, 2 Vern. R. 150; Beverley *v.* Beverley, 2 Vern. 133; Montefiori *v.* Montefiori, 1 W. Black. R. 363; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*x*); Vauxhall Bridge *v.* Spencer, Jac. R. 67

imposition practised by one of the parties upon third persons, by intentional concealment or misrepresentation. And, therefore, if the parties act under a mutual innocent mistake, and with entire good faith, the concealment or misrepresentation of a material fact will not induce the Court to compel the party concealing it, or affirming it, to make it good, or to place the other party in the same situation as if the fact were as the latter supposed.[1] There must be some ingredient of fraud, or some wilful misstatement, or concealment, which has misled the other side.

§ 273. Upon a similar ground, a settlement, secretly made by a woman, in contemplation of marriage, of her own property to her own separate use, without her intended husband's privity, will be held void, as it is in derogation of the marital rights of the husband,[2]

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[1] Merewether *v.* Shaw, 2 Cox, R. 121; Scott *v.* Scott, 1 Cox, R. 366; 1 Fonbl. Eq. B. 1. ch. 4, § 11; Pitcairne *v.* Ogbourne, 2 Ves. 375.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 11, and note (z): Id. ch. 2, § 6, note (o); Jones *v.* Martin, 3 Anst. R. 882; S. C. 5 Ves. 266, note; Fortescue *v.* Hennah, 19 Ves. 66; Bowes *v.* Strathmore, 2 Bro. Ch. R. 345; S. C. 2 Cox, R. 28; 1 Ves. jr. 22; 6 Bro. Par. Cas. (by Tomlins) 427; Ball *v.* Montgomery, 2 Ves. jr. 194; Carlton *v.* Earl of Dorset, 2 Vern. 17; Gregor *v.* Kemp, 3 Swanst. R. 401, note; Goddard *v.* Snow, 1 Russell, R. 185; Tucker *v.* Andrews, 13 Maine, 124; Waller *v.* Armistead, 2 Leigh, 11; Manes *v.* Durant, 2 Rich. Eq. R. 401; McAfee *v.* Ferguson, 9 B. Monroe, 475; England *v.* Downs, 2 Beavan, R. 522. On this occasion Lord Langdale said: "Joan Mason was a widow with three children, and under the will of her first husband, she was entitled to some freehold and leasehold property, to some furniture, and to the stock in trade, with which she carried on business as a victualler. Contemplating a second marriage, she considered that she ought to make a provision for her children by the first, and being informed that a will which she had made, would, upon her marriage, become ineffectual, she made a settlement, and thereby provided that a portion of her freehold property should be subjected to her own power of appointment, but that subject to such power of appointment, that part of her estate over which the power extended,

and a fraud upon his just expectations.[1] And a secret conveyance made by a woman, under like circumstances

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together with all the rest of her property, should be limited to her own separate use for her life, with remainder for her three daughters in the manner therein mentioned. In the execution of this settlement, so far as it made provision for her children, she was performing a moral duty; in the circumstances in which she was placed it was clearly her duty before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived; but in performing a duty towards her children, she had no right to act fraudulently towards her second husband. If a woman, entitled to property, enters into a treaty for marriage, and during the treaty represents to her intended husband that she is so entitled, that upon the marriage he will become entitled *jure mariti*, and if, during the same treaty, she clandestinely conveys away the property, in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question, whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband. It is not doubted that proof of direct misrepresentations, or of wilful concealment with intent to deceive the husband, would entitle him to relief, but it is said that mere concealment is not, in such a case, any evidence of fraud, and that if a man without making any inquiry as to a woman's affairs and property, thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain, if, in the absence of any care on his part, she has taken care of herself and her children without his knowledge. This proposition, however, cannot be admitted as stated; and clearly a woman in such circumstances, can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband. If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as was the case in Goddard *v.* Snow, there is still a fraud practised on the husband. The non-acquisition of property, of which he had no notice, is no disappointment, but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought to have been his, and which is, without his consent, made

[1] Ibid. Lance *v.* Norman, 2 Ch. Rep. 41 [79]; Blanchet *v.* Foster, 2 Ves. 264; England *v.* Downs, 2 Beavan, R. 522.

in favor of a person for whom she is under no moral obligation to provide, would be treated in the like manner. But, if she should only reasonably provide for her children by a former marriage under circumstances of good faith,[1] it would be otherwise.[2] In like manner, if, previous to her marriage, a woman should represent herself to her intended husband to be possessed of property, which she should secretly convey away before the marriage, the husband would be entitled to relief against such conveyance.[3] However, circumstances may occur which may deprive the husband of any remedy, as if before the marriage he acquires a knowledge of the prior settlement,[4] or if he has so conducted himself after the settlement, that the wife cannot, without dishonor to herself live with him. [Or, cannot without disgrace, retire from the marriage, as, when the intended husband induced her to cohabit with him before marriage.[5]]

independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage. Nevertheless, cases have occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent, and whether fraud is made out must depend on the circumstances of each case, — as an unmarried woman has a right to dispose of her property as she pleases, and as a conveyance made immediately before her marriage is *primâ facie* good, it is to be impeached only by the proof of fraud." Taylor *v.* Pugh, 1 Hare, R. 608, 613, 616; De Manville *v.* Compton, 1 Ves. & Beam. 351.

[1] But see Terry *v.* Hopkins, 1 Hill's Ch. R. 1; Ramsay *v.* Joyce, 1 McMullans Eq. R. 237, 251; Manes *v.* Durant, 2 Rich. Eq. R. 404.

[2] Ibid.; King *v.* Cotton, 2 P. Will. 357, 674; St. George *v.* Wake, 1 Mylne *v.* Keen, 610; England *v.* Downs, 2 Beav. R. 522; De Manville *v.* Compton, 1 Ves. & Beam. 354.

[3] England *v.* Downs, 2 Beavan, R. 512.

[4] See Logan *v.* Simmons, 3 Iredell, Eq. R. 487; Manes *v.* Durant, 2 Rich. Eq. R. 404; Ashton *v.* McDougall, 5 Beavan, 56; Griggs *v.* Staples, 13 Jur. 32; Maher *v.* Hobbs, 2 Y. & C. Exch. Cas. 317; Terry *v.* Hopkins, 1 Hills, Ch. R. 4.

[5] Taylor *v.* Pugh, 1 Hare, 608.

§ 274. It is upon the same ground of public policy, that contracts in restraint of marriage are held void.[1] A reciprocal engagement between a man and a woman to marry each other is unquestionably good.[2] But a contract, which restrains a person from marrying at all, or from marrying anybody, except a particular person, without enforcing a corresponding reciprocal obligation on that person, is treated as mischievous to the general interests of society, which are promoted by the encouragement and support of suitable marriages.[3] Courts of Equity have in this respect followed, although not to an unlimited extent, the doctrine of the Civil Law, that marriage ought to be free.[4]

§ 275. Where, indeed, the obligation to marry is reciprocal, although the marriage is to be deferred to some future period, there may not be, as between the parties, any objection to the contract in itself, if in all other respects it is entered into in good faith, and there is no reason to suspect fraud, imposition, or undue influence.[5] But, even in these cases, if the contract is designed by the parties to impose upon third persons, as upon parents or friends, standing *in loco parentis*, or in some other particular relation to the

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1 Hartley *v.* Rice, 10 East, R. 22; Lowe *v.* Peers, 4 Burr. 2225, Woodhouse *v.* Shipley, 2 Atk. 539, 540; Newland on Contracts, ch. 33, p. 472 to 476; 2 White & Tudor's Eq. Lead Cas. 89, and notes.

2 Cock *v.* Richards, 10 Ves. 438; Key *v.* Bradshaw, 2 Vern. 102.

3 1 Fonbl. Eq. B. 1, ch. 4, § 10; Baker *v.* White, 2 Vern. 215; Woodhouse *v.* Shipley, 2 Atk. 595; Lowe *v.* Peers, 4 Burr, 2225; Phillips *v.* Medbury, 7 Conn. 568; Cock *v.* Richards, 10 Ves. 429; Key *v.* Bradshaw, 2 Vern. 102; Atkins *v.* Farr, 1 Atk. R. 287; S. C. 2 Eq. Abridg. 247, 248.

4 Dig. Lib. 35, tit. 1, l. 62, 63, 64; Key *v.* Bradshaw, 2 Vern. 102; 1 Fonbl. Eq. B. 1, ch. 4, § 10.

5 Lowe *v.* Peers, 4 Burr. 2229, 2230; Key *v.* Bradshaw, 2 Vern. 102.

parties, so as to disappoint their bounty, or to defeat their intentions in the settlement or disposal of their estates; there, if the contract is clandestine, and kept secret for this purpose, it will be treated by Courts of Equity as a fraud upon such parents or other friends, and as such be set aside; or the equities will be held the same as if it had not been entered into.[1] The general ground upon which this doctrine is sustained, is, that parents, and other friends, standing *in loco parentis*, are thereby induced to act differently in relation to the advancement of their children and relatives, from what they would if the facts were known; and the best influence which might be exerted in persuading their children and relatives to withdraw from an unsuitable match, is entirely taken away. To give effect to such contracts would be an encouragement to persons to lie upon the watch to procure unequal matches against the consent of parents and friends, and to draw on improvident and clandestine marriages, to the destruction of family confidence, and the disobedience of parental authority.[2] These are objects of so great importance to the best interests of society, that they can scarcely be too deeply fixed in the public policy of a nation, and especially of a Christian nation.

§ 276. In the Civil Law a strong desire was manifested to aid in the establishment of marriages, as has been already intimated.[3] And, hence, all conditions

[1] Woodhouse *v.* Shipley, 2 Atk. 535, 539; Cock *v.* Richards, 10 Ves. 436, 438.

[2] Woodhouse *v.* Shipley, 2 Atk. 539; Cock *v.* Richards, 10 Ves. 438, 439; Newland on Contracts, ch. 33, p. 476.

[3] Ante, § 260.

annexed to gifts, legacies, and other valuable interests, which went to restrain marriages generally, were deemed inconsistent with public policy, and held void. A gift, therefore, to a woman, of land, if she should not marry, was held an absolute gift. *Mæviæ, si non nupserit, fundum quum morietur, lego; potest dici, et si nupserit, eam confestim ad legatum admitti.*[1] *Si testator rogasset hæredem, ut restituat hæreditatem mulieri, si non nupsisset; dicendum erit compellendum hæredem, si suspectam dicat hæreditatem, adire et restituere eam mulieri, etiamsi nupsisset.*[2] So, a gift to a father, if his daughter, who is under his authority, (*in potestate,*) should not marry, was treated as an absolute gift; the condition being held void.[3] The avowed ground of these decisions was, that all such conditions were a fraud upon the law which favored marriage; *Quod in fraudem legis ad impediendas nuptias scriptum est, nullam vim habet.*[4]

§ 277. But a distinction was taken in the Civil Law between such general restraints of marriage, and a special restraint, as to marrying or not marrying a particular person; the latter being deemed not unjustifiable. Thus, a gift, upon condition that a woman should not marry Titius, or not marry Titius, Scius, or Mævius, was held valid.[5] And the distinction was in some cases even more refined; for, if a legacy was given to a wife upon condition that she should not marry while she had children, (*si a liberis ne nupserit,*) the condition was nugatory; but, if it was, that she should not marry

[1] Pothier, Pand. Lib. 35, tit. 1, n. 33; Dig. Lib. 35, tit. 1, l. 72, § 5.
[2] Pothier, Pand. Lib. 35, tit. 1, n. 33; Dig. Lib. 36, tit. 1, l. 65, § 1.
[3] Pothier, Pand. Lib. 35, tit. 1, n. 35.
[4] Pothier, Pand. Lib. 35, tit. 1, n. 35; Dig. Lib. 35, tit. 1, l. 79, § 4.
[5] Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35, tit. 1, l. 63, l. 64.

while she had children in puberty, (*si a liberis impuberibus ne nupserit,*) it was good.[1] And the reason given is, that the care of children, rather than widowhood, might be enjoined; *Quia magis cura liberorum, quam viduitas, injungeretur.*[2]

§ 278. Courts of Equity, in acting upon cases of a similar nature, have been in no small degree influenced by these doctrines of the Civil Law.[3] But it has been doubted, whether the same grounds, upon which the Roman Law acted, can or ought to be acted on in a Christian country, under the Common Law. Lord Rosslyn has endeavored to account for the introduction of these doctrines into the English Courts of Equity, from the desire of the latter to adopt, upon legatary questions, the rules of the Ecclesiastical Courts, which were borrowed directly from the Civil Law. And speaking upon the subject of the rule of the Civil Law, as to conditions in restraint of marriage, he said:[4] "How it should ever have come to be a rule of decision in the Ecclesiastical Court is impossible to be accounted for, but upon this circumstance, that, in the unenlightened ages, soon after the revival of letters, there was a blind, superstitious adherence to the text of the Civil Law. They never reasoned; but only looked into the books, and transferred the rules without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance,

1 Pothier, Pand. Lib. 35, tit. 1, n. 34; Dig. Lib. 35, tit. 1, l. 62, § 2.
2 Ibid.
3 1 Fonbl. Eq. B. 1, ch. 4, § 10; Stackpole *v.* Beaumont, 3 Ves. jr. 96.
4 Stackpole *v.* Beaumont, 3 Ves. jr. 96, per Lord Rosslyn. See, also, Lord Thurlow's Judgment, in the case of Scott *v.* Tyler, 2 Bro. Ch. R. 487; S. C. 2 Dick. R. 712. 2 White & Tudor's Eq. Lead. Cas. and notes.

how, in a Christian country, they should have adopted the rule of the Roman Law, with regard to conditions as to marriage. First, where there is an absolute, unlimited liberty of divorce, all rules as to marriage are inapplicable to a system of religion and law, where divorce is not permitted. Next, the favor to marriage, and the objection to the restraint of it, were a mere political regulation, applicable to the circumstances of the Roman Empire at that time, and inapplicable to other countries. After the civil war, the depopulation, occasioned by it, led to habits of celibacy. In the time of Augustus, the Julian Law, which went too far, and was corrected by the *Lex Papia Poppæa*, not only offered encouragement to marriage, but laid heavy impositions upon celibacy. That being established, as a rule in restraint of celibacy, (it is an odd expression,) and for the encouragement of all persons who would contract marriage, it necessarily followed, that no person could act contrary to it by imposing restraints directly contrary to the law. Therefore, it became a rule of construction, that these conditions were null. It is difficult to apply that to a country where there is no law to restrain individuals from exercising their own discretion, as to the time and circumstances of the marriage, which their children, or objects of bounty, may contract. It is perfectly impossible now, whatever it might have been formerly, to apply that doctrine, not to lay conditions to restrain marriage under the age of twenty-one, to the law of England; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one, without the consent of the parent."

§ 279. It is highly probable, that this view of the origin of the English doctrine, as to conditions in

restraint of marriage, annexed to gifts, legacies, and other conveyances of interests, is historically correct.[1]

[1] See Scott *v.* Tyler, 2 Bro. Ch. R. 487; S. C. 2 Dick. R. 712; Clarke *v.* Parker, 19 Ves. 13; Reynish *v.* Martin, 3 Atk. 330, 331, 332; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654.—Lord Thurlow, in Scott *v.* Tyler, (2 Dick. R. 716 to 721;) has traced out, with much learning and ability, the gradual introduction and progress of the Civil Law doctrine, through the instrumentality of the Canon Law, into the law of England. I gladly extract a portion of his statements, as they may tend to instruct the student more exactly in a branch of the law, confessedly not without some anomalies. "The earlier cases (said he) refer, in general terms, to the Canon Law, as the rule by which all legacies are to be governed. By that law, undoubtedly, all conditions, which fell within the scope of this objection, the restraint of marriage, are reputed void; and, as they speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection. Towards the latter end of the last, and beginning of the present century, the matter is more loosely handled. The Canon Law is not referred to, (professedly, at least,) as affording a distinct and positive rule for annulling the obnoxious conditions. On the contrary, they are treated as partaking of the force allowed them by the law of England. But, in respect of their imposing a restraint of marriage, they are treated at the same time as unfavorable and contrary to the common weal and good order of society. It is reasoned, that parental duty and affection are violated, when a child is stripped of its just expectations. That such an intention is improbably imputed to a parent; particularly in those instances where there was no misalliance; as in marriage with the houses of Bellases, Bertie, Cecil, and Semphile; which the parent, if he had been alive, would probably have approved. These ideas apply indifferently to bequests of lands and of money, and were, in fact, so applied in one very remarkable case. Nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent; and every mode of artificial reasoning was adopted to relax their rigor. This was thought more practicable, by calling them conditions subsequent; although, if that had made such difference, they were, and, indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest. At length, it became a common phrase, that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that, which he never meant should happen; but the Court disposed of such conditions, so as to make them amount to no more. On the other hand, some provisions against improvident matches, especially during infancy, or to a certain age, could

But, whether it be so, or not, it may be affirmed, without fear of contradiction, that the doctrine on this sub-

not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion, on the marriage of an infant orphan without consent. The Court of Chancery is in the constant habit of restraining and punishing such marriages. And the Legislature has at length adopted the same idea, as far as it was thought general regulation could, in sound policy, go. In this situation the matter was found about the middle of the present century; when doubts occurred, which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or, rather, the arguments, on which they proceeded. The better opinion, or, at least, that which prevailed, was, that devises of land, with which the Canon Law never had any concern, should follow the rule of the Common Law; and that legacies of money, being of that sort, should follow the rule of the Canon Law. Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands, (though I do not find this yet resolved,) follow the rule of the Common Law; and such trusts are to be executed with analogy to it. Mere money legacies follow the rule of the Canon Law; and all trusts of that nature are to be executed with analogy to that. But still, if I am not mistaken, the question remains unresolved, What is the nature and extent of that rule, as applied to conditions in restraint of marriage? The Canon Law prevails in this country, only so far as it hath been actually received, with such ampliations and limitations as time and occasion have introduced; and subject at all times to the Municipal Law. It is founded in the Civil Law; consequently the tenets of that law also may serve to illustrate the received rules of the Canon Law. By the Civil Law the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment; insomuch that a will was regarded as inofficious, which did not in some sort satisfy it. By the positive institutions of that law, it was also provided, Si quis cælibatûs, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariusve e conditione liberi sunto; neque eo minus delatam hæreditatem, legatumve, ex hac lege, consequantur. In ampliation of this law, it seems to have been well settled in all times, that, if, instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void. Upon the same principle, in further ampliation of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law, if a slight turn of the phrase

ject, at present maintained and administered by Courts of Equity, (for it has undergone some important changes,) is far better adapted to the exigencies of modern society throughout Christendom, than that which was asserted by the Roman law. While it upholds the general freedom of choice in marriages, it, at the same time, has a strong tendency to preserve a just control and influence in parents, in regard to the marriages of their children, and a reasonable power in all persons to qualify and restrict their bounty in such a manner, and on such conditions, as the general right of dominion over property in a free country justifies and protects, upon grounds of general convenience and safety.

§ 280. The general result of the modern English doctrine on this subject (for it will not be found easy to reconcile all the cases),[1] may be stated in the following summary manner. Conditions, annexed to gifts, legacies, and devises, in restraint of marriage, are not void, if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy, and the due economy and morality of domestic life, it will be held utterly void.[2]

were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent, for that also is a lawful condition; and, for the rest, the condition not being lawful, is holden *pro non adjecto*."

[1] Scott *v.* Tyler, 2 Bro. Ch. R. 487; 2 Dick. R. 718; Stackpole *v.* Beaumont, 3 Ves. 95; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*).

[2] Reily *v.* Monck, 3 Ridgw. P. R. 205, 211, 247, 261; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Rishton *v.* Cobb, 9 Sim. 615; Pratt *v.* Tyler, 2 Bro. Ch. R. 487; Harvey *v.* Ashton, Com. Rep. 726; S. C. 1 Atk. 301.

And so, if the condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party, upon whom it is to operate, is unreasonably restrained in the choice of marriage, it will fall under the like consideration.[1] Thus, where a legacy was given to a daughter, on condition that she should not marry without consent, or should not marry a man who was not seised of an estate in fee simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage.[2] [And in a later case it was held that a general condition in restraint of marriage is good as to the testator's widow,[3] but not good with respect to any other person.[4]]

§ 281. But the same principles of public policy, which annul such conditions, when they tend to a general restraint of marriage, will confirm and support them when they merely prescribe such reasonable and provident regulations and sanctions, as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would

[1] Keily *v.* Monck, 3 Ridgw. Parl. R. 205, 214, 247, 261; 1 Eq. Abridg. p. 110, *Condition*, C in Marg.; Morley *v.* Rennaldson, 2 Hare, R. 570.

[2] Keily *v.* Monck, 3 Ridgw. Parl. R. 205, 214, 247, 261; 1 Chitty, Eq. Dig. *Marriage*, W.

[3] There are many direct authorities that a condition in a devise of real estate to the testator's widow, that she shall remain single, is valid, and if she marry, the rights of the heirs attach. Commonwealth *v.* Stauffer, 10 Barr, 350; Phillips *v.* Medbury, 7 Conn. R. 568; Bennet *v.* Robinson, 11 Watts, 348; Pringle *v.* Dunkley, 4 Sm. & M. 16; Vance *v.* Campbell, 1 Dana, 229.]

[4] Lloyd *v.* Lloyd. 10 Eng. Law & Eq. R. 139; Grace *v.* Webb, 15 Sim. 384.

probably lead.[1] If parents, who must naturally feel the deepest solicitude for the welfare of their children, and other near relatives and friends, who may well be presumed to take a lively interest in the happiness of those with whom they are associated by ties of kindred, or friendship, could not, by imposing some restraints upon their bounty, guard the inexperience and ardor of youth against the wiles and delusions of the crafty and the corrupt, who should seek to betray them from motives of the grossest selfishness, the law would be lamentably defective, and would, under the pretence of upholding the institution of marriage, subvert its highest purposes. It would, indeed, encourage the young and the thoughtless to exercise a perfect freedom of choice in marriage; but it would be at the expense of all the best objects of the institution, the preservation of domestic happiness, the security of private virtue, and the rearing of families in habits of sound morality, and filial obedience and reverence. Such a reproach does not belong to the Common Law in our day; and, least of all, can it be justly attributed to Courts of Equity.

§ 282. Mr. Fonblanque has, with great propriety, remarked: "The only restrictions which the Law of England imposes, are such as are dictated by the soundest policy, and approved by the purest morality. That a parent, professing to be affectionate, shall not be unjust; that, professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generosity shall not be allowed

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*g*).

to operate as a temptation to do that which militates against nature, morality, or sound policy, or to restrain from doing that which would serve and promote the essential interests of society; [these] are rules which cannot easily be reprobated, as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise. On these considerations are founded those distinctions which have from time to time been recognized in our Courts of Equity, respecting testamentary conditions with reference to marriage." [1]

§ 283. Godolphin also has very correctly laid down the general principle. "All conditions against the liberty of marriage are unlawful. But, if the conditions are only such, as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect to time, place, or person, then such conditions are not utterly to be rejected." [2] Still, this language is to be understood with proper limitations; that is to say, that the restraints upon marriage, in respect to time, place, or person, are reasonably asserted. For it is obvious that restraints as to time, place, and person, may be so framed, as to operate a virtual prohibition upon marriage, or, at least, upon its most important and valuable objects. As, for instance, a condition that a child should not marry until fifty years of age; [3] or should not marry any person inhabiting in the same town, county, or state; or should not marry any person who was a clergyman, a physician, or a lawyer, or any person, except of a particular trade or employ-

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*).

[2] Godolphin's Orphan's Legacy, Pt. 1, ch. 15, § 1.

[3] But see 1 Roper on Legacies, ch. 13, § 2, p. 716, edit. by White.

ment; for these would be deemed a mere evasion or fraud upon the law.[1]

§ 284. On the other hand, some provisions against improvident matches, especially during infancy, or until a certain age of discretion, cannot be deemed an unreasonable precaution for parents and other persons to affix to their bounty.[2] Thus, a legacy given to a daughter to be paid her at twenty-one years of age, if she does not marry until that period, would be held good, for it postpones marriage only to a reasonable age of discretion.[3] So, a condition, annexed to a gift or legacy, that the party should not marry without the consent of parents or trustees, or other persons specified, is held good; for it does not impose an unreasonable restraint upon marriage; and it must be presumed that the person selected will act with good faith and sound discretion in giving or withholding their consent.[4] The Civil Law, indeed, seems, on this point, to have adopted a very different doctrine; holding that the requirement of the consent of a third person, and especially of an interested person, is a mere fraud upon the law.[5]

§ 285. Other cases have been stated, which are governed by the same principles. Thus, it has been said, that a condition not to marry a widow is no un-

[1] See Scott *v.* Tyler, 2 Dick. R. 721, 722; 2 Brown, Ch. R. 488.

[2] Scott *v.* Tyler, 2 Dick. R. 719.

[3] See Stackpole *v.* Beaumont, 3 Ves. 96, 97; Scott *v.* Tyler, 2 Dick. R. 721, 722, 724.

[4] Desbody *v.* Beyville, 2 P. Will. 547; Scott *v.* Tyler, 2 Bro. Ch. R. 431, 485; 2 Dick. R. 712; Clarke *v.* Parker, 19 Ves. 1; Lloyd *v.* Branton, 3 Meriv. R. 108; Dashwood *v.* Bulkley, 10 Ves. 229.

[5] Lord Thurlow, in Scott *v.* Tyler, 2 Dick. R. 720; Ayliffe, Pand. B. 3, tit. 21, p. 374.

lawful injunction; for it is not in general restraint of marriage. So, a condition that a widow shall not marry, is not unlawful, neither is an annuity during widowhood only.[1] A condition to marry, or not to marry Titius or Mævia is good. So, a condition, prescribing due ceremonies and a due place of marriage, is good. And so any other conditions of a similar nature, if not used evasively, as a covert purpose to restrain marriage generally.[2] [And on the same general principle, a condition that the legatee shall not become a nun is valid, and although the will contain no bequest over, the legacy is forfeited, if the legatee does become a nun.[3]]

§ 286. But Courts of Equity are not generally inclined to lend an indulgent consideration to conditions in restraint of marriage;[4] and on that account, (being

[1] Lloyd *v.* Lloyd, 10 Eng. Law & Eq. R. 139. — Conditions, requiring widowhood, were generally void by the Civil Law, when the legacy was to the party herself; but not where it was to a third person. Ayliffe, Pand. B. 3, tit. 21, p. 374. Legatum alii sub conditione sic relictum; Si uxor nuptui se post mortem mariti non collocaverit, contractis nuptiis, conditione deficit, ideoque peti nequaquam potest. Cod. Lib. 6, tit. 40, l. 1; Pothier, Pand. Lib. 35, tit. 1, n. 35. In Parsons *v.* Winslow, (6 Mass. R. 169,) where the legacy was during widowhood and life, without any bequest over, the Court held the condition to be *in terrorem* only; and that the legatee took, notwithstanding a second marriage. See Hooper *v.* Dundas, 10 Barr, 75; Bennett *v.* Robinson, 10 Watts, 348; The Commonwealth *v.* Stauffer, 10 Barr, 350. But see Scott *v.* Tyler, 2 Dick. R. 721, 722; S. C. 2 Brown, Ch. R. 488; Harvey *v.* Aston, 1 Atk. 379; Marples *v.* Bainbridge, 1 Madd. R. 590; Richards *v.* Baker, 2 Atk. 321; 1 Roper on Legacies, by White, ch. 13, § 2, p. 721, 722.

[2] Scott *v.* Tyler, 2 Bro. Ch. R. 488; 2 Dick. R. 721, 722; Godolp. Orp. Leg. Pt. 3, ch. 17, § 1 to 10; Ayliffe, Pand. B. 3, tit. 21, p. 374.

[3] Dickson, *in re*, 1 Eng. Law & Eq. R. 149.

[4] See Long *v.* Dennis, 4 Burr. R. 2052. — Lord Mansfield, in Long *v.* Dennis, 4 Burr. R. 2055, said: "Conditions in restraint of marriage are odious, and are, therefore, held to the utmost rigor and strictness." Lord

in no small degree influenced by the doctrines of the Civil and Canon Law,) they have not only constantly manifested an anxious desire to guard against any abuse, to which the giving of one person any degree of control over another might eventually lead; but they have, on many occasions, resorted to subtleties and artificial distinctions, in order to escape from the positive directions of the party imposing such conditions.

§ 287. One distinction is, between cases where, in default of a compliance with the condition, there is a bequest over, and cases where there is not a bequest over, upon a like default of the party to comply with the condition. In the former case, the bequest over becomes operative upon such default, and defeats the prior legacy.[1] In the latter case (that is, where there is no bequest over) the condition is treated as ineffectual, upon the ground that the testator is to be deemed to use the condition *in terrorem* only, and not to impose a forfeiture, since he has failed to make any other disposition of the bequest upon default in the condition.[2]

Eldon seems to have disapproved of this generality of expression, in Clarke *v.* Parker, 19 Ves. 19.

[1] Clarke *v.* Parker, 19 Ves. 13; Lloyd *v.* Branton, 3 Meriv. R. 108, 119; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Wheeler *v.* Bingham, 3 Atk. 368; Malcolm *v.* O'Callaghan, 2 Madd. R. 350; Chauncey *v.* Graydon, 2 Atk. 616.

[2] Harvey *v.* Aston, 1 Atk. 361, 375, 377; Reynish *v.* Martin, 3 Atk. 330; 1 Wilson, R. 130; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Pendarvis *v.* Hicks, 2 Freeman, R. 41; Pullen *v.* Ready, 2 Atk. R. 587; Long *v.* Dennis, 4 Burr. 2055; 1 Eq. Abridg. 110, C.; Parsons *v.* Winslow, 6 Mass. R. 169; 1 Roper on Legacies, by White, ch. 13, § 1, p. 654 to 660; Id. § 2, p. 687, 715 to 727; Eastland *v.* Reynolds, 1 Dick. R. 317.

§ 288. Another distinction is taken between conditions in restraint of marriage, annexed to a bequest of personal estate, and the like conditions, annexed to a devise of real estate, or to a charge on real estate, or to things savoring of the realty. In the latter cases (touching real estate) the doctrine of the Common Law, as to conditions, is strictly applied. If the condition be precedent, it must be strictly complied with, in order to entitle the party to the benefit of the devise or gift. If the condition be subsequent, its validity will depend upon its being such as the law will allow to devest an estate. For, if the law deems the condition void as against its own policy, then the estate will be absolute and free from the condition. If, on the other hand, the condition is good, then a non-compliance with it will defeat the estate, in the same manner as any other condition subsequent will defeat it.[1]

§ 289. But, if the bequest be of personal estate, a different rule seems to have prevailed, founded, in all probability, upon the doctrines maintained in the Ecclesiastical Courts, and derived from the Canon and Civil Law.[2] If the condition in restraint of marriage be

[1] Co. Litt. 206, a & b; Id. 217, a; Id. 237, Harg. and Butler's note, (152); Bertie *v.* Faulkland, 3 Ch. Cas. 130; S. C. 2 Freeman, R. 220; 2 Vern. R. 333; 1 Eq. Cas. Abridg. 108, margin; Harvey *v.* Aston, Com. R. 726; S. C. 1 Atk. 261; Reynish *v.* Martin, 3 Atk. 330, 332, 333; Fry *v.* Porter, 1 Mod. R. 300; Long *v.* Rickets, 2 Sim. & Stu. R. 179; Commonwealth *v.* Stauffer, 10 Barr, 350; Popham *v.* Bamfield, 1 Vern. R. 83; 1 Fonbl. Eq. B. 1, ch. 4, § 10, note (*q*); Graydon *v.* Hicks, 2 Atk. 16; Peyton *v.* Bury, 2 P. Will. 626; 1 Roper on Legacies, by White, ch. 13, § 1, p. 650, 666; Id. § 2, p. 687 to 727; Post, § 290, note (2).

[2] 1 Roper on Legacies, by White, ch. 13, § 1, p. 650 to 660; Scott *v.* Tyler, 2 Bro. Ch. R. 487; 2 Dick. R. 712; Stackpole *v.* Beaumont, 3 Ves. 96.

subsequent and general in its character, it is treated as the like condition is at law, in regard to real estate, as a mere nullity, and the legacy becomes pure and absolute.[1] If it be only a limited restraint, (such as to a marriage with the consent of parents, or not until the age of twenty-one,) and there is no bequest over upon default, the condition subsequent is treated as merely *in terrorem;* and the legacy becomes pure and absolute.[2] But if the restraint be a conditional precedent, then it admits of a very different application from the rule of the Common Law in similar cases as to real estate. For, if the condition regard real estate, and be in general restraint of marriage, there, although it is void, yet, as we have seen, if there is not a compliance with it, the estate will never arise in the devisee. But, if it be a legacy of personal estate, under like circumstances, the legacy will be held good and absolute, as if no condition whatsoever had been annexed to it.

§ 290. Whether the same rule is to be applied to legacies of personal estate upon a condition precedent, not in restraint of marriage generally, but of a limited, and qualified, and legal character, where there is no bequest over, and there has been a default in complying with the condition, has been a question much vexed and discussed in Courts of Equity, and upon which some diversity of judgment has been expressed. There are certainly authorities, which go directly to establish the doctrine, that there is no distinction in cases of this sort between conditions precedent and conditions sub-

1 See Morley *v.* Rennoldson, 2 Hare, 570.

2 Lloyd *v.* Branton, 3 Meriv. R. 117; Marples *v.* Bainbridge, 1 Madd. R. 590; 1 Roper on Legacies, by White, ch. 13, § 1, p. 651, &c.; Id. § 2, p. 715, 747; Garret *v.* Pretty, 2 Vern. R. 293; Wheeler *v.* Brigham, 3 Atk. 364; Hooper *v.* Dundas, 10 Barr. 75.

sequent. In each of them, if there is no bequest over, the legacy is treated as pure and absolute, and the condition is made *in terrorem* only. The Civil Law and Ecclesiastical Law recognize no distinction between conditions precedent and conditions subsequent, as to this particular subject.[1] On the other hand, there are authorities, which seem to inculcate a different doctrine, and to treat conditions precedent, as to legacies of this sort, upon the same footing as any other bequests or devises at the Common Law; that is to say, that they are to take effect only upon the condition precedent being complied with, whether there be a bequest over or not.[2]

§ 291. But, whichever of these opinions shall be deemed to maintain the correct doctrine, there is a modification of the strictness of the Common Law, as to conditions precedent in regard to personal legacies, which is at once rational and convenient, and promotive of the real intention of the testator. It is, that where a literal compliance with the condition becomes impossible from unavoidable circumstances, and without any default of the party, it is sufficient that it is complied with, as nearly as it practically can be, or (as it is tech-

[1] See Harvey *v.* Aston, 1 Atk. 375; S. C. Rep. 738; Reynish *v.* Martin, 3 Atk. R. 332.

[2] The former doctrine (that is, that there is no difference between conditions precedent and conditions subsequent, as to this point,) was maintained by Lord Hardwicke, in Reynish *v.* Martin, 3 Atk. 330; and was recognized by Lord Clare, in Kelly *v.* Monck, 3 Ridgw. R. 263, and by Sir Thomas Plumer, in Malcolm *v.* O'Callaghan, 2 Madd. R. 349, 353. See also Garbut *v.* Hilton, 1 Atk. 381. But the contrary doctrine is indicated in Hemmings *v.* Munckley, 1 Bro. Ch. 303; Scott *v.* Tyler, 2 Bro. Ch. R. 488; 2 Dick. R. 723, 724; Stackpole *v.* Beaumont, 3 Ves. 89; See also Knight *v.* Cameron, 14 Ves. 388; Clarke *v.* Parker, 19 Ves. 13; Elton *v.* Elton, 1 Ves. 4. Mr. Roper, in his work on Legacies, 1 Roper, on Leg. by White, ch. 13, § 1, p. 654 to 660; Id. § 2, p. 715 to 727, is

nically called) *Cy pres.* This modification is derived from the Civil Law, and stands upon the presumption, that the donor could not intend to require impossibilities, but only a substantial compliance with his directions, as far as they should admit of being fairly carried into execution. It is upon this ground that Courts of Equity constantly hold, in cases of personal legacies, that a substantial compliance with the condition satisfies it, although not literally fulfilled. Thus, if a legacy upon a condition precedent should require the consent of three persons to a marriage, and one or more of them should die, the consent of the survivor or survivors would be deemed a sufficient compliance with the condition.[1] And, *a fortiori*, this doctrine would be applied to conditions subsequent.[2]

§ 292. Another class of constructive frauds, and so deemed, because inconsistent with the general policy of the law, is that of bargains and contracts made in restraint of trade.[3] And here, the known and established distinction is between such bargains and con-

of opinion, that the weight of authority is with the latter doctrine; and so is Mr. Hovenden, in his Supplement to Vesey jr., Vol. 1, p. 353, note to 3 Ves. 89. See also Mr. Saunders's note to Harvey *v.* Aston, 1 Atk. 381. — A distinction has also been taken between cases of personal legacies, and cases of portions charged on land. In the former, the condition may perhaps, be dispensed with, at least under some circumstances; in the latter, the condition must be complied with, to entitle the party to take, although there may be no devise over. See Harvey *v.* Aston, 1 Atk. R. 361; S. C. Com. Rep. 726; Cas. T. Talb. 212.

[1] Swinburne on Wills, Pt. 4, § 7, n. 4, p. 262; 1 Roper on Legacies, by White, ch. 13, § 2, p. 691, 692. See Clarke *v.* Parker, 19 Ves. 1, 16, 19.

[2] See 1 Roper on Legacies, ch. 13, § 2, p. 691; Peyton *v.* Bury, 2 P. Will. 626; Graydon *v.* Hicks, 2 Atk. 16, 18; Arslabie *v.* Rice, 3 Madd. R. 256; Worthington *v.* Evans, 1 Sim. & Stu. R. 165.

[3] See the authorities on this subject fully collected in Parsons on Contracts. Vol. I (now in press.)]

tracts, as are in general restraint of trade, and such as are in restraint of it only as to particular places or persons. The latter, if founded upon a good and valuable consideration, are valid. The former are universally prohibited. The reason of this difference is, that all general restraints upon trade have a tendency to promote monopolies, and to discourage industry, enterprise, and just competition, and thus to do mischief to the party by the loss of his livelihood and the subsistence of his family, and mischief to the public, by depriving it of the services and labors of a useful member.[1] [And an association of carriers or forwarders, to regulate the price of freight and passage by a uniform scale, to be fixed by themselves, and agreeing to divide the profits with each other, with provisions prohibiting the members from engaging in similar business out of the association, has been thought to be within the mischief of contracts in general restraint of trade.][2] But the same reasoning does not apply to a special restraint, not to carry on trade in a particular place, or with particular persons, or for a limited reasonable time; for this restraint leaves all other places, and persons, and times free to the party, to pursue his trade and employment.[3] And it may even be beneficial to the country, that a particular place should not be overstocked with artisans or other persons, engaged in a particular trade or business;[4] or a particular trade may be promoted

[1] Mitchell *v.* Reynolds, 1 P. Will. 181, where the subject is most elaborately considered. See also Pierce *v.* Fuller, 8 Mass. R. 223; Morris *v.* Colman, 18 Ves. 436; Alger *v.* Thacher, 19 Pick. 51.

[2] Stanton *v.* Allen, 5 Denio, 431.

[3] Raunie *v.* Irving, the Jurist, (1844), vol. 8, p. 1051.

[4] Ibid.; Davis *v.* Mason, 5 T. R. 118; Chesman *v.* Nainby, 3 Bro. Parl. Cas. 349; Shackle *v.* Baker, 14 Ves. 468; Crutterell *v.* Lye, 17 Ves. 336;

by being for a short period limited to a few persons; especially if it be a foreign trade recently discovered, and it can be beneficial but to a small number of adventurers.[1] And, for a like reason, a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret.[2]

§ 293. Upon analogous principles, agreements, whereby parties engage not to bid against each other at a public auction, especially in cases where such auctions are directed or required by law, as in cases of sales of chattels or other property on execution, are held void; for they are unconscientious, and against public policy, and have a tendency injuriously to affect the character and value of sales at public auction, and to mislead private confidence. They operate virtually as a fraud upon the sale.[3] So, if underbidders or puffers are employed at an auction to enhance the price[4] and deceive other bidders, and they are, in fact, misled,[5] the sale will be held void, as against public policy.[6]

Harrison *v.* Gardner, 2 Madd. R. 198; Pierce *v.* Fuller, 8 Mass. R. 223; Perkins *v.* Lyman, 9 Mass. R. 522; Stearns *v.* Barrett, 1 Pick. R. 443; Palmer *v.* Stebbins, 3 Pick. R. 188; Pierce *v.* Woodward, 6 Pick. R. 206.

[1] Perkins *v.* Lyman, 9 Mass. R. 522, 530.

[2] Bryson *v.* Whitehead, 1 Sim. & Stu. 94; Vickery *v.* Welch, 19 Pick. 523.

[3] Jones *v.* Caswell, 3 Johns. Cas. 29; Doolin *v.* Ward, 6 Johns. R. 194; Wilbur *v.* Howe, 8 Johns. 444; Gardiner *v.* Morse, 25 Maine, 140; Brisbane *v.* Adams, 3 Comst. 130; Hamilton *v.* Hamilton, 2 Rich. Eq. R. 355; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*x*).

[4] [But not if the object be not to enhance the price, but *bonâ fide* to prevent a sacrifice of the property offered for sale, or any honest and reasonable purpose. Phippen *v.* Stickney, 3 Met. 387, and cases cited. See Veazie *v.* Williams, 3 Story, 632.]

[5] See Tomlinson *v.* Savage, 6 Iredell, Eq. R. 430; Id. 278; Veazie *v.* Williams, 8 How. U. S. R. 134; Latham *v.* Morrow, 6 B. Monroe, 630.

[6] See Howard *v.* Castle, 6 T. R. 642; Bramlet *v.* Alt. 3 Ves. 619, 623,

§ 293 *a*. So, where contracts are entered into between parties pending a bill in Parliament for the charter of a corporation for a private purpose, (as, for example, a railway,) and the agreement is to be concealed from Parliament, in order to procure the bill to be passed without the knowledge thereof, and thereby to produce a false impression, or to mislead or suppress inquiry, or to withdraw public opposition thereto on grounds of public or private general interest, such contracts will be held void as a constructive fraud upon Parliament, as well as upon the public at large.[1]

[§ 293 *b*. So, in America, a contract to procure the passage of an act of the Legislature, by any sinister means, or by using personal influence with the members, is void, as being inconsistent with public policy and the integrity of our political institutions.[2] So, a contract founded on an agreement to procure signatures and obtain a pardon for a criminal, of the Governor, is illegal.[3] So, a contract to abandon the prosecution of a petition presented to the House of Commons, against

624; Connolly *v.* Parsons, Id. 621, note; Smith *v.* Clark, 12 Ves. 577. But see Bexwell *v.* Christie, Cowp. R. 395; Twining *v.* Morrice, 2 Bro. Ch. R. 326; 1 Madd. Ch. Pr. 257; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, p. 390; 2 Kent, Comm. Lect. 39, p. 537, 538, (5th edit.); Steele *v.* Ellmaker, 11 Serg. & Rawle, 86. [And where property is advertised to be sold "without reserve," such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can, under any possible circumstances, affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser. Robinson *v.* Wall, 2 Phillips, Ch. R. 372.]

[1] Lord Howden *v.* Simpson, 10 Adolph. & Ell. 743; Simpson *v.* Lord Howden, 1 Keen, R. 583; S. C. 3 Mylne & Craig, R. 97; The Vauxhall Bridge Co. *v.* Earl Spencer, 2 Madd. R. 356; S. C. Jac. R. 64.

[2] Clippinger *v.* Hepbaugh, 5 Watts & Serg. 315; Wood *v.* McCann, 6 Dana, 366.

[3] Hatzfeld *v.* Gulden, 7 Watts, 152.

the return of a member accused of bribery is illegal.[1] So, where a city charter prohibited any member of the council from being interested in any contract, payment for which was to be made by vote of such council, and a member by a secret arrangement with a contractor became interested in such a contract, a note given by such contractor to the member for his share of the profits, is wholly void, even in the hands of an innocent assignee.[2]]

§ 294. In like manner, agreements, which are founded upon violations of public trust or confidence, or of the rules adopted by Courts in furtherance of the administration of public justice, are held void. Thus, an agreement made for a remuneration to commissioners, appointed to take testimony, and bound to secrecy by the nature of their appointment, upon their disclosure of the testimony so taken, is void.[3] [So, an agreement by a party to a suit to pay a witness a certain sum for his attendance, and more if the party promising succeeded in the suit, is void.[4] So, a contract by a deputy sheriff to pay the sheriff a certain sum as the price of his appointment as such deputy.[5]] So, an assignment of the half-pay of a retired officer of the army is void; for it operates as a fraud upon the public bounty.[6] So, an assignment of the fees and profits of the office of keeping a house of tor-

[1] Coppock *v.* Bower, 4 M. & W. 361.

[2] Bell *v.* Quin, 2 Sandf. 146.

[3] Cooth *v.* Jackson, 6 Ves. 12, 31, 32, 35.

[4] Dawkins *v.* Gill, 10 Ala. 206.

[5] Ferris *v.* Adams, 23 Verm. 136.

[6] Stone *v.* Liddledale, 2 Anst. 533; M'Carthy *v.* Goold, 1 Ball & Beatty, R. 389. See Davis *v.* Duke of Marlborough, 1 Swanst. R. 74, 79; Osborne *v.* Williams, 18 Ves. 379. [*Contra* as to the difference

rection and of the profits of the tap-house connected with it, is void; for the former plainly tends to oppression and extortion, and the latter to increase riot and debauchery among the prisoners.[1] Agreements, founded upon the suppression of criminal prosecutions, fall under the same consideration. They have a manifest tendency to subvert public justice.[2] So, wager contracts, which are contrary to sound morals, or injurious to the feelings or interests of third persons, or against the principles of public policy or duty, are void.[3] So, of contracts to enable a person to violate the license laws.[4] So are contracts, which have a tendency to encourage champerty.[5]

§ 295. Another extensive class of cases, falling under this head of constructive fraud, respects contracts for the buying, selling, or procuring of public offices. It is obvious, that all such contracts must have a material influence to diminish the respectability, responsibility, and purity of public officers, and to introduce a system of official patronage, corruption, and deceit, wholly at war with the public interests.[6] The confidence of offi-

received by an officer upon retiring from full pay, and going upon half-pay. Price *v.* Lovett, 4 Eng. Law & Eq. R. 110.]

[1] Methwold *v.* Walbank, 2 Ves. 238.

[2] Johnson *v.* Ogilby, 3 P. Will. 276, and Cox's note (1); Kein *v.* Leeman, 9 Ad. & El. N. S. 371; Newland on Contr. ch. 8, p. 158; Shaw *v.* Reed, 30 Maine, 105.

[3] De Costa *v.* Jones, Cowp. 729; Atherford *v.* Beard, 2 T. Rep. 610; Gilbert *v.* Sykes, 16 East, R. 150; Hartley *v.* Rice, 10 East, 22; Allen *v.* Hearn, 1 T. Rep. 56; Shirley *v.* Shankey, 2 Bos. & Pull. 130. See Doolubdass *v.* Ramboll, 3 Eng. Law & Eq. R. 39; Ramboll *v.* Soojumnull, 6 Morse, P. C. 300.

[4] Ritchie *v.* Smith, 6 C. B. R. 462.

[5] Powler *v.* Knowler, 2 Atk. 224.

[6] 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*u*); Chesterfield *v.* Janssen, 1 Atk. 352; S. C. 2 Ves. 124, 156; Boynton *v.* Hubbard, 7 Mass. R. 119; Hartwell *v.* Hartwell, 4 Ves. 811, 815.

cers may thereby not only be abused and perverted to the worst purposes; but mischievous arrangements may be made, to the injury of the public; and persons may be introduced or kept in office, who are utterly unqualified to discharge the proper functions of their stations.[1] Such contracts are justly deemed contracts of moral turpitude;[2] and are calculated to betray the public interests into the administration of the weak, the profligate, the selfish, and the cunning. They are, therefore, held utterly void, as contrary to the soundest public policy; and, indeed, as a constructive fraud upon the government.[3] It is acting against the spirit of the constitution of a free government, by which it ought to be served by fit and able persons, recommended by the proper officers of the government for their abilities, and from motives of disinterested purity.[4] It has been strongly remarked, that there is no rule better established, (it should be added, in law and reason, for, unfortunately, it is often otherwise in practice,) respecting the disposition of every office, in which the public are concerned, than this, *Deter Digniori*. On principles of public policy, no money consideration

[1] Chesterfield *v.* Janssen, 1 Ves. 155, 156; S. C. 1 Atk. 352; Newland on Contracts, ch. 33, p. 477 to 482.

[2] Morris *v.* McCulloch, 2 Eden, R. 190; S. C. Ambler, R. 435; Law *v.* Law, 3 P. Will. 391*; S. C. Cas. T. Talb. 110; Harrington *v.* Du Chastel, 2 Swanst. 167, note; S. C. 1 Bro. Ch. R. 124.

[3] Bellamy *v.* Burrow, Cas. T. Talb. 97; Harrington *v.* Du Chastel, 1 Bro. Ch. R. 124; S. C. 2 Swanst. R. 167, note; Garforth *v.* Fearon, 1 H. Black. 327, 329; Palmer *v.* Bate, 6 Moore, R. 28; S. C. 2 Bro. & Bing. 673; Waldo *v.* Martin, 4 B. & Cressw. R. 319; Parsons *v.* Thompson, 1 H. Black. 322, 326.

[4] Morriss *v.* McCulloch, 2 Eden, R. 190; S. C. Ambler, R. 432, 435; Ive *v.* Ash, Prec. Ch. 199; Co. 231 a; East India Company *v.* Neave, 4 Ves. 173, 181, 184; Hartwell *v.* Hartwell, 4 Ves. 811.

ought to influence the appointment to such offices.[1] It was observed of old, that the sale of offices accomplished the ruin of the Roman Republic. *Nullâ aliâ re magis Romana Respublica interiit, quam quod magistratûs officia venalia erant.*[2]

§ 296. Another class of agreements, which are held to be void on account of their being against public policy, are such as are founded upon corrupt considerations, or moral turpitude, whether they stand prohibited by statute or not; for these are treated as frauds upon the public or moral law.[3] The rule of the Civil Law on this subject, speaks but the language of universal justice. *Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est.*[4] It is but applying a preventive check, by withholding every encouragement from wrong, and aiming thereby to enforce the obligations of virtue. For, although the law, as a science, must necessarily leave many moral precepts without due enforcement, as rules of imperfect obligation only, it is most studious not thereby to lend the slightest countenance to the violations of such precepts. Wherever the divine law, or the positive law, or the Common Law, prohibits the doing of certain acts, or enjoins the discharge of certain duties, any agreement to do such acts, or not to discharge such duties, is against the dearest interests of society, and, therefore, is held void; for, otherwise, the

[1] Lord Kenyon in Blackford *v.* Preston, 8 T. Rep. 92; Newland on Contracts, 478.

[2] Cited Co. Litt. 234 a.

[3] Newland on Contracts, ch. 32, p. 469, &c.; 1 Fonbl. Eq. B. 1, ch. 4, § 5.

[4] Cod. Lib. 2, tit. 3, l. 6.

law would be open to the just reproach of winking at crimes and omissions, or tolerating, in one form, what it affected to reprobate in another.[1] Hence, all agreements, bonds, and securities, given as a price for future [or past[2]] illicit intercourse[3] (*præmium pudoris*), or for the commission of a public crime, or for the violation of a public law, or for the omission of a public duty,[4] are deemed incapable of confirmation or enforcement, upon the maxim, *Ex turpi contractu non oritur actio.*[5]

§ 296 *a.* But where a party to an illegal or immoral contract comes himself to be relieved from that contract or its obligations, he must distinctly and exclusively state such grounds of relief as the Court can legally attend to; and he must not accompany his claim to relief, which may be legitimate, with other claims and complaints, which are contaminated with the original immoral purpose; for if he sets up as a ground of relief the non-fulfilment of the illegal contract on the other side, and thereby that he is released from his obligation to perform it, that shows that he still relies

[1] 1 Fonbl. Eq. B. 4, ch. 4, § 4, and notes (*s*), (*y*).

[2] Beaumont *v.* Reese, 8 Q. B. Rep. 483.

[3] See Sherman *v.* Barrett, 1 McMull, Eq. R. 147.

[4] [That is, as to future neglect, but not to *past*. A contract to indemnify an officer for past neglect of duty is not illegal. Hall *v.* Huntoon, 17 Verm. R. 244.]

[5] 1 Fonbl. Eq. B. 1, ch. 4, § 4, and notes (*s*), (*y*); Walker *v.* Perkins, 3 Burr. 1568; Franco *v.* Bolton, 3 Ves. 370; Benyon *v.* Nettlefold, 2 Eng. Law & Eq. R. 113; Clarke *v.* Perram, 2 Atk. 333, 337; Whaley *v.* Norton, 1 Vern. R. 483; Robinson *v.* Gee, 1 Ves. R. 251, 254; Gray *v.* Mathias, 5 Ves. 286; Ottley *v.* Browne, 1 Ball & Beatt. 360; Battersley *v.* Smith, 3 Madd. R. 110; Thompson *v.* Thompson, 7 Ves. 470; St. John *v.* St. John, 11 Ves. 535, 536. But see Spear *v.* Hayward, Prec. Ch. 114.

upon the immoral contract and its terms for relief and therefore the Court will refuse it.[1]

§ 297. Other cases might be put to illustrate the doctrine of Courts of Equity, in setting aside the agreements and acts in fraud of the policy of the law. Thus, if a devise is made upon a secret trust for charity, in evasion of the statutes of mortmain, it will be set aside.[2] So, if a parent grant an annuity to his son to qualify him to kill game, he will not be permitted, by tearing off the seal, to avoid the conveyance.[3] So, if a person convey an estate to another to qualify him to sit in Parliament, or to become a voter, he will not be permitted to avoid it, upon the ground of its having been done by him in fraud of the law, and upon a secret agreement that it shall be given up.[4] So, conveyances made of estates in trust, in order to secure the party from forfeitures for treason or felony, will be set aside against the Crown; but they will be good against the party. So, contracts affecting public elections, are held void; so are assignments of rights or property, *pendente lite*, when they amount to, or partake of, the character of maintenance of champerty, and are reprehended by the law.[5]

§ 298. And here, it may be well to take notice of a distinction, often, but not universally acted on in Courts of Equity, as to the nature and extent of the

[1] Bates *v.* Chester, 5 Beavan, R. 103.

[2] Strickland *v.* Aldrich, 9 Ves. 516; Muckleston *v.* Bruen, 6 Ves. 52.

[3] 1 Madd. Ch. Pract. 242; Curtis *v.* Perry, 6 Ves. 747; Birch *v.* Blagrave, Ambler, R. 264, 265.

[4] See The Duke of Bedford *v.* Coke, 2 Ves. 116, 117; 3 P. Will. 233; 1 Madd. Ch. Pr. 213.

[5] Waller *v.* Duke of Portland, 3 Ves. 494; Stevens *v.* Bagwell, 15 Ves. 139; Strachan *v.* Brander, 1 Eden, R. 303; 18 Ves. 127, 128.

relief, which will be granted to persons who are parties to agreements or other transactions against public policy, and, therefore, are to be deemed *participes criminis*. In general, (for it is not universally true,)[1] where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita*, or *mala in se*, Courts of Equity, following the rule of law, as to participators in a common crime,[2] will not at present interpose to grant any relief; acting upon the known maxim, *In pari delicto potior est conditio defendentis, et possidentis*.[3] But in cases where the

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1 The relief granted in Courts of Equity, in cases of usury, constitutes an exception. Smith *v.* Bromley, Doug. R. 695, note; Id. 697, 698. In this case Lord Mansfield said: "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action [to recover back the money]; for, where both parties are equally criminal against such general laws, the rule is *Potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover. And it is astonishing that the Reports do not distinguish between the violation of the one sort and the other." Id. p. 697; Astley *v.* Reynolds, 2 Str. R. 915. See 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note (*r*); 1 Madd. Ch. Pr. 211, 212; Browning *v.* Morris, Cowp. R. 790.

2 Buller, N. P. 131, 132; Harrington *v.* Bigelow, 11 Paige, 349.

3 See Bromley *v.* Smith, Doug. R. 697, note; Id. 698; Vandyck *v.* Herritt, 1 East, R. 96; Hanson *v.* Hancock, 8 T. Rep. 575; Browning *v.* Morris, Cowp. R. 790; Osborne *v.* Williams, 18 Ves. 379; Buller, N. P. 131, 132; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*y*); Bosanquet *v.* Dashwood, Cas. T. Talb. 37, 40, 41.—I say, *at present;* for there has been considerable fluctuation of opinion, both in Courts of Law and Equity on this subject. The old cases often gave relief, both at Law and in Equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and probably politic and moral rule, which is, to leave the parties where it finds them, giving no relief and no countenance to claims of this sort. See the cases at law, Tompkins *v.* Bernet, 1 Salk. 22; Bromley *v.* Smith, Doug. R. 695, note; Collins *v.* Blantern, 2 Wils. R. 347; Lowry *v.* Bourdieu, Doug.

agreements or other transactions are repudiated on account of their being against public policy, the circumstance, that the relief is asked by a party who is *particeps criminis*, is not in Equity material. The reason is, that the public interest requires that relief should be given; and it is given to the public through the party.[1] And in these cases relief will be granted, not only by setting aside the agreement or other transaction, but, also, in many cases, by ordering a repayment of any money paid under it.[2] Lord Thurlow,

R. 468; Marak *v.* Abel, 3 Bos. & Pull. 39; Vandyck *v.* Herritt, 1 East, R. 96; Lubbock *v.* Potts, 7 East, R. 449, 456; Browning *v.* Morris, Cowp. R. 750; Hanson *v.* Hancock, 8 T. Rep. 575; McCullum *v.* Gourley, 8 Johns. R. 117; Buller, N. P. 181; 1 Fonbl. Eq. B. 1, ch. 4, § 4, and note (*y*); Buller, N. P. 131, 132; Inhab. of Worcester *v.* Eaton, 11 Mass. R. 368, 376, 377; Phelps *v.* Decker, 10 Mass. R. 267, 274. And in Equity, see the cases of Neville *v.* Wilkinson, 1 Bro. Ch. R. 543, 547, 548; Jacob. R. 67; Watts *v.* Brooks, 3 Ves. jr. R. 612; East India Company *v.* Neave, 5 Ves. 173, 181, 184; Thompson *v.* Thompson, 7 Ves. 469; Knowles *v.* Haughton, 11 Ves. 168; St. John *v.* St. John, 11 Ves. 535, 536; Osborne *v.* Williams, 18 Ves. 379; Bosanquet *v.* Dashwood, Cas. T. Talb. 37; Rider *v.* Kidder, 10 Ves. 366; Rawdon *v.* Shadwell, Ambler, R. 269, and Mr. Blunt's notes. In the case of Phelps *v.* Decker (10 Mass. R. 271,) it was broadly laid down that "by the Common Law, deeds of conveyance, or other deeds, made contrary to the provisions of a general statute, or for an unlawful consideration, or to carry into effect a contract unlawful in itself, or in consequence of any prohibitory statute, are void, *ab initio*, and may be avoided by plea; or on the general issue, *non est factum*, the illegality may be given in evidence." But, in a later case, the doctrine was qualified; and the Court took the distinction between bonds and contracts, sought to be enforced, and actual conveyances of lands or other property. The former might be avoided; the latter were treated as actual transfers, and governed by the same rule, as the payment of money, or the delivery of a personal chattel. Inhabitants of Worcester *v.* Eaton, 11 Mass. 375 to 379.

[1] St. John *v.* St. John, 11 Ves. 535, 536; Bromley *v.* Smith, Doug. R. 695, 697, 698; Hatch *v.* Hatch, 9 Ves. 292, 298; Roberts *v.* Roberts, 3 P. Will. 66, 74, and note (1); Browning *v.* Morris, Cowp. R. 790; Morris *v.* McCulloch, 2 Eden, R. 190, and note Id. 193.

[2] See Goldsmith *v.* Bruning, 1 Eq. Abridg. Bonds, &c. F. 4, p. 89;

indeed, seems to have thought, that in all cases where money had been paid for an illegal purpose, it might be recovered back, observing, that if Courts of Justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but, by putting the parties back to the state in which they were before.[1] But this is pushing the doctrine to an extravagant extent, and effectually subverting the maxim, *In pari delicto potior est conditio defendentis.* The ground of reasoning, upon which his Lordship proceeded, is exceedingly questionable in itself; and the suppression of illegal contracts is far more likely, in general, to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check, naturally connected with a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern doctrine is established.[2] Relief is not granted where both parties are truly *in pari delicto,* unless in cases where public policy would thereby be promoted.[3]

1 Fonbl. Eq. B. 1, ch. 2, § 13, and note; Smith *v.* Bruning, 2 Vern. R. 392; Morris *v.* McCulloch, Ambler, R. 432; S. C. 2 Eden, R. 180.—Money paid will not in all cases be ordered to be paid back. For instance, a bond, given for future illicit intercourse, will be decreed to be set aside; but money paid under the bond will not, under all circumstances, be directed to be repaid. See Newland on Contracts, ch. 33, p 483 to 492; Hill *v.* Spencer, Ambler, R. 641, and Id. App. 836 (Blunt's edition); Nye *v.* Mosely, 6 B. & Cressw. 133; Dig. Lib. 12, tit. 5, l. 4, § 3. See also cases of gaming before the statute, in Chesterfield *v.* Janssen, 2 Ves. 137, 138. See also Inhabitants of Worcester *v.* Eaton, 11 Mass. R. 376, 377.

1 Neville *v.* Wilkinson, 1 Bro. Ch. R. 517, 518; 18 Ves. 382.

2 See Sharp *v.* Taylor, 2 Phillips, Ch. R 801.

3 See the remarks of Lord Eldon in Rider *v.* Kidder, 10 Ves. 356; Smith *v.* Bromley, Doug. R. 696, note. See also Adams *v.* Barrett, 6 Georgia, R. 404.

§ 299. Even in cases of a *præmium pudicitiæ*, the distinction has been constantly maintained between Bills for restraining the woman from enforcing the security given,[1] and Bills for compelling her to give up property already in her possession under the contract. At least, there is no case to be found, where the contrary doctrine has been acted on, except where creditors were concerned. And in this respect the English Law seems to have had a steady regard to the policy of the Roman Jurisprudence.[2]

[1] See Weakley *v.* Watkins, 7 Humph. 356.

[2] Rider *v.* Kidder, 10 Ves. 366.— The Roman Law has stated some doctrines and distinctions upon this subject, which are worthy of consideration. I shall quote them without commenting upon them. They are partially cited in 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*y*). Three cases are put. (1.) Where the turpitude is on the part of the receiver only; and there the rule is, Quod si turpis causa accipientis fuerit, etiamsi res secuta sit, repeti potest. Dig. Lib. 12, tit. 5, l. 1, § 2. (2.) Where the turpitude is on the part of the giver alone; and there the rule is the contrary. Cessat quidem condictio, quum turpiter datur. Pothier, Pand. Lib. 12, tit. 5, art. 8. (3) Where the turpitude affects both parties; and there the rule is, Ubi autem et dantis et accipientis turpitudo versatur, non posse repeti dicimus; veluti, si pecunia detur, ut male judicetur. Dig. Lib. 12, tit. 5, l. 3; Pothier, Pand. Lib. 12, tit. 5, n. 7. The reason given is: In pari causa possessor potior haberi debet. Dig. Lib. 50, tit. 17, l. 128; Pothier, Pand. Lib. 12, tit. 5, n. 7. Several other examples are given under this head. Idem, si ob stuprum datum sit; vel si quis, in adulterio deprehensus, redemerit se, cessat enim repetitio. Item, si dederit fur, ne proderetur; quoniam utriusque turpitudo versatur, cessat repetitio. Dig. Lib. 12, tit. 5, l. 4; Pothier, Pand. Lib. 12, tit. 5, n. 7. Cum te propter turpem causam contra disciplinam temporum meorum, domum adversariæ dedisse profitearis; frustra eam tibi restitui desideras; cum in pari causa possessoris conditio melior habeatur. Cod. Lib. 4, tit. 7, l. 2; Pothier, Pand. Lib. 12, tit. 5, l. 7. Sed quod meretrici datur, repeti non potest. Sed nova ratione, non ea, quod utriusque turpitudo versatur, sed solius dantis; a new reason, which Pothier, as well as Ulpian, seems to doubt. See Dig. Lib. 12, tit. 5, l. 4, § 3; Pothier, Pand. Lib. 12, tit. 5, n. 7, and note (6). On the other hand, when the money had not been paid, or the contract fulfilled, the Roman Law deemed the contract void. Quamvis enim utriusque turpitudo versatur,

§ 300. And, indeed, in cases, where both parties are *in delicto*, concurring in an illegal act, it does not always follow, that they stand *in pari delicto;* for there may be and often are, very different degrees in their guilt.[1] One party may act under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age; so that his guilt may be far less in degree, than that of his associate in the offence.[2] And, besides; there may be, on the part of the Court itself, a necessity of supporting the public interests or public policy, in many cases, however reprehensible the acts of the parties may be.[3]

§ 301. In cases of usury, this distinction has been adopted by the Courts of Equity. All such contracts being declared void by the statute against usury, Courts of Equity will follow the law in the construction of the statute. If, therefore, the usurer or lender come into a Court of Equity, seeking to enforce the contract, the Court will refuse any assistance, and repudiate the contract.[4] But, on the other hand, if the borrower comes into a Court of Equity, seeking relief against the usurious contract, the only terms, upon

ac solutæ quantitatis cessat repetitio, tamen ex hujusmodi stipulatione, contra bonos mores interposita, denegandas esse actiones juris auctoritate demonstratur. Cod. Lib. 4, tit. 7, l. 5; Pothier Pand. Lib. 12, tit. 5, n. 9.

[1] Smith *v.* Bromley, Doug. R. 696; Browning *v.* Morris, Cowp. R. 790; Osborne *v.* Williams, 18 Ves. 379; Phalen *v.* Clark, 19 Conn. 421.

[2] Bosanquet *v.* Dashwood, Cas. T. Talb. 37, 40, 41; Chesterfield *v.* Janssen, 2 Ves. 156, 157; Osborne *v.* Williams, 18 Ves. 379.

[3] See Woodhouse *v.* Meredith, 1 Jac. & Walk. 224, 225; 1 Fonbl. Eq. B. 1, ch. 4, § 4, note (*y*); Bosanquet *v.* Dashwood, Cas. T. Talb. 37, 40, 41; Smith *v.* Bromley, Doug. R. 696, note; Browning *v.* Morris, Cowp. R. 790; Morris *v.* McCulloch, 2 Eden, 190, and note 193.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Fanning *v.* Dunham, 5 Johns. Ch. R. 142, 143, 144.

which the Court will interfere, are, that the plaintiff will pay the defendant, what is really and *bonâ fide* due to him, deducting the usurious interest,[1] and, if the plaintiff do not make such offer in his bill, the defendant may demur to it, and the bill will be dismissed.[2] The ground of this distinction is, that a Court of Equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a discretion on the subject, and may prescribe the terms of its interference; and he who seeks equity at its hands, may well be required to do equity. And it is against conscience, that the party should have full relief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation.[3] For then a statute, made to prevent fraud and oppression, would be made the instrument of fraud. But, in the other case, if Equity should relieve the lender, who is plaintiff, it would be aiding a wrongdoer, who is seeking to make the Court the means of carrying into effect a transaction manifestly wrong and illegal in itself.[4]

§ 302. And, upon the like principles, if the borrower has paid the money upon an usurious contract, Courts of Equity (and indeed, Courts of Law also)[5]

[1] See Whitehead *v.* Peck, 1 Kelly, 110; Ballinger *v.* Edwards, 4 Iredell's Eq. R. 449.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Id. B. 1, ch. 4, § 7, note (*h*); Mason *v.* Gardiner, 4 Bro. Ch. R. 436; Rogers *v.* Rathbun, 1 Johns. Ch. R. 367; Fanning *v.* Dunham, 5 Johns. Ch. R. 142, 143, 144.

[3] Scott *v.* Nesbit, 2 Bro. Ch. R. 641; S. C. 2 Cox, R. 183; Benfield *v.* Solomons, 9 Ves. 84.

[4] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*); Id. B. 1, ch. 4, § 7, and note (*h*).

[5] 1 Fonbl. Eq. B. 1, ch. 4, § 7, and note (*k*); Smith *v.* Bromley, Doug. R. 696, note; Browning *v.* Morris, Cowp. R. 792; Bond *v.* Hays, Ex'r., 13 Mass. R. 34; Nichols *v.* Bellows, 22 Verm. 581.

will assist him to recover back the excess paid beyond principal and lawful interest; but not further. [So, the borrower may maintain a bill to compel the giving up of securities left as collateral security for a usurious debt, although he might have a defence in an action at law.[1]] For it is no just objection to say, that he is *particeps criminis*, and that *Volenti non fit injuria*. It would be absurd to apply the latter maxim to the case of a man, who, from mere necessity, pays more than the other can in justice demand, and who has been significantly called the slave of the lender. He can in no just sense be said to pay voluntarily. And as to being *particeps criminis*, he stands *in vinculis*, and is compelled to submit to the terms, which oppression and his necessities impose on him.[2] Nor can it be said, in any case of oppression, that the party oppressed is *particeps criminis*; since it is that very hardship, which he labors under, and which is imposed upon him by another, that makes the crime.[3]

§ 303. In regard to gaming contracts, it would follow, *a fortiori*, that Courts of Equity ought not to interfere in their favor, but ought to afford aid to suppress them; since they are not only prohibited by statute, but may be justly pronounced to be immoral,

[1] Peters *v.* Mortimer, 4 Edw. Ch. R. 279.

[2] Smith *v.* Bromley, Doug. 996, note; Bosanquet *v.* Dashwood, Cas. Temp. Talb. 39; Browning *v.* Morris, Cowp. R. 790; Rawden *v.* Shadwell, Ambler, R. 269, and Mr. Blunt's notes; 1 Fonbl. Eq. B. 1, ch. 4, § 8, note (*k*).

[3] Lord Chancellor Talbot, in Bosanquet *v.* Dashwood, Cas. Temp. Talb. 41. — The same principle applies to cases of annuities set aside for want of a memorial duly registered; and an account of the consideration paid, and payments made, will be taken, and the balance only will be required to be paid, upon a decree to give up the security. Holbrook *v.* Sharpey, 19 Ves. 131.

as the practice tends to idleness, dissipation, and the ruin of families.[1] No one has doubted that, under such circumstances, a bill in Equity might be maintained to have any gaming security delivered up and cancelled.[2] But it was at one time held, that, if the money were actually paid in a case of gaming, Courts of Equity ought not to assist the loser to recover it back, upon the ground that he is *particeps criminis*. Lord Talbot on one occasion said: "The case of gamesters, to which this (of usury) has been compared, is no way parallel; for there both parties are criminal. And, if two persons will sit down, and endeavor to ruin one another, and one pays the money; if, after payment, he cannot recover it at law, I do not see that a Court of Equity has any thing to do, but to stand neuter,[3] there being in that case no oppression upon the party, as in this."[4]

§ 304. But it is difficult to perceive, why, upon principle, the money should not be recoverable back, in

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note (*c*). See Robinson *v.* Bland, 2 Burr. 1077.

[2] Rawden *v.* Shadwell, Ambler, R. 269, and Mr. Blunt's notes; Woodroffe *v.* Farnham, 2 Vern. 291; Wynne *v.* Callender, 1 Russ. R. 23; Baker *v.* Williams, cited in Blunt's note to Ambler, R. 269; Portarlington *v.* Soulby, 3 Mylne & Keen, 101; Osbaldiston *v.* Simpson, 13 Simons, R. 513.

[3] [In America, it has been recently held, that a Court of Chancery would not set aside a deed, the consideration of which was an illegal wager. It would leave the parties where it found them. Thomas *v.* Cronie, 16 Ohio, 51. See, also, Raguert *v.* Cowles, 14 Ohio, 55.]

[4] Bosanquet *v.* Dashwood, Cas. Tem. Talb. 41; 1 Fonbl. Eq. B. 1, ch. 4, § 6; Rawdon *v.* Shadwell, Amb. R. 269; Wilkinson *v.* L'Eaugier, 2 Y. & Coll. 366. It has been recently held in England, that money, knowingly lent to game, is not recoverable. McKimell *v.* Robinson, 3 Mees. & Welsb. 434. [So, in Massachusetts, White *v.* Bushy, 3 Cush. 448. So, money lent to bet on an election. Machier *v.* Morse, 2 Gratt. 257.]

furtherance of a great public policy, independently of any statutable provision.[1] It has been decided, that, if money is paid upon a gaming security, it may be recovered back, for the security is utterly void.[2] Why is not the original gaming contract equally void? And if it be, why is it not equally within the rule and the policy on which the rule is founded?

§ 305. The Civil Law contains a most wholesome enforcement of moral justice upon this subject. It not only protects the loser against any liability to pay the money won in gaming; but if he has paid the money, he and his heirs have a right to recover it back at any distance of time; and no presumption or limitation of time runs against the claim. *Victum in aleæ lusu, non posse conveniri. Et, si solverit, habere repetitionem, tam ipsum, quam hæredes ejus, adversus victorem et ejus hæredes; idque perpetuo, et etiam post triginta annos.*[3] Thirty years was the general limitation of rights in other cases.

§ 306. Questions are also often made, as to how far contracts, which are illegal by some positive law, or which are declared so upon principles of public policy, are capable, as between the parties, of a substantial confirmation. This subject has been already alluded to, and will be again touched in other places. The general rule is, that wherever any contract or conveyance is void, either by a positive law, or upon principles of public policy, it is deemed incapable of confirmation, upon the maxim, *Quod ab initio non valet, in tractu temporis non convalescit.*[4] But where it is merely voidable,

[1 See McKinney *v.* Pope, 3 B. Monroe, 93, Boner *v.* Montgomery, 9 B. Monroe, 128]

2 1 Fonbl. Eq. B. 1, ch. 4, § 6, and note (*c*).

3 Cod Lib. 3 tit. 43, l. 1, 1 Fonbl. Eq. B. 1, ch. 4, § 6, note (*c*).

4 Vernon's case, 4 Co. R. 2, b.

or turns upon circumstances of undue advantage, surprise, or imposition, there, if it is deliberately, and upon full examination, confirmed by the parties, such confirmation will avail to give it an *ex post facto* validity.[1]

§ 307. Let us, in the next place, pass to the consideration of the second head of constructive frauds, namely, of those which arise from some peculiar confidential or fiduciary relation between the parties. In this class of cases, there is often to be found some intermixture of deceit, imposition, overreaching, unconscionable advantage, or other mark of direct and positive fraud. But the principle on which Courts of Equity act in regard thereto, stands, independent of any such ingredients, upon a motive of general public policy; and it is designed, in some degree, as a protection to the parties against the effects of overweening confidence, and self-delusion, and the infirmities of hasty and precipitate judgment. These Courts will, therefore, often interfere in such cases, where, but for such a peculiar relation, they would either abstain wholly from granting relief, or would grant it in a very modified and abstemious manner.[2]

§ 308. It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion, to prevent a voluntary gift or other act of a

[1] Newland on Contracts, ch 25, p. 496 to 503, Chesterfield *v.* Janssen, 2 Ves. 125, S. C 1 Atk. 301; Roberts *v* Roberts, 3 P. Will. 74, Mr Cox's note; Cole *v.* Gibson, 1 Ves 507, Crone *v* Ballard, 3 Bro. Ch R 120, Cowen *v.* Milner, 3 P. Will 292, note (C), Cole *v.* Gibbons, 3 P Will. 289; 1 Fonbl. Eq. B 1, ch. 2, § 13, note (*r*), Id ch. 2, § 14, note (*v*), and the note to § 263

[2] See Goddard *v.* Carlisle, 9 Price, R. 169; Gallatuan *v.* Cunningham, 8 Cowen, R. 361; Taylor *v.* Taylor, 8 How. U S. C. R. 200

man, whereby he strips himself of his property, that Courts of Equity have deemed themselves at liberty to interpose in cases of this sort.[1] They do not sit, or affect to sit, in judgment upon cases, as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good.[2] Courts of Equity will not, therefore, arrest or set aside an act or contract, merely because a man of more honor would not have entered into it. There must be some relation between the parties, which compels the one to make a full discovery to the other, or to abstain from all selfish projects. But, when such a relation does exist, Courts of Equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance, for it is founded in a breach of confidence.[3] The general principle, which governs in all cases of this sort is, that if a confidence is reposed, and that confidence is abused, Courts of Equity will grant relief.[4]

[1] Huguenin *v.* Basley, 14 Ves. 290.

[2] See Taylor *v.* Taylor, 8 How. U. S. C. R. 200.

[3] Fox *v.* Mackreth, 2 Bro. Ch. R. 407, 420.

[4] Gartside *v.* Isherwood, 1 Bro. Ch. R. App. 560, 562; Osmond *v.* Fitzroy, 3 P. Will. 129, 131, Cox's note. See The English Quarterly Magazine for May, 1843, Vol. 29, Pt. 2, p. 362 to 378.

§ 309. In the first place, as to the relation of parent and child. The natural and just influence which a parent has over a child, renders it peculiarly important for Courts of Justice to watch over and protect the interests of the latter; and, therefore, all contracts and conveyances, whereby benefits are secured by children to their parents, are objects of jealousy, and if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside,[1] unless third persons have acquired an interest under them;[2] especially where the original purposes for which they have been obtained, are perverted or used as a mere cover.[3] [And the same principles apply to a voluntary gift to a person who has put himself *in loco parentis*, towards the donor.[4]] But we are not to indulge undue suspicions of jealousy, or to make unfavorable presumptions as a matter of course in cases of this sort. "It is undoubtedly the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to

[1] See Slocum *v.* Marshall, 2 Wash. C. C. 397.

[2] See Taylor *v.* Taylor, 8 How. U. S. C. R. 201; also, Caspell *v.* Dubois, 4 Barb. 393; Brice *v.* Brice, 5 Barb. 533; Whalan *v.* Whalan, 2 Cow 537.

[3] Young *v.* Peachey, 2 Atk. 254; Glissen *v.* Ogden, Ibid. 258; Corking *v.* Pratt, 1 Ves. 400; Hawes *v.* Wyatt, 3 Bro. Ch. R. 156; 1 Madd. Ch. Pract. 244, 245; Carpenter *v.* Heriot, 1 Eden, R. 338; Blackborn *v.* Edgely, 1 P. Will. 607. [See Baker *v.* Tucker, 2 Eng. Law & Eq. R. 1, where Blackborn *v.* Edgely, is elaborately examined and approved.] Blunden *v.* Barker, 1 P. Will. 639; Morris *v.* Burroughs, 1 Atk. 402; Tendril *v.* Smith, 2 Atk. 85; Heron *v.* Heron, 2 Atk. R. 160. See Jenkins *v.* Pye, 12 Peters, R. 241.

[4] [Archer *v.* Hudson, 7 Beav. 551. See Maitland *v.* Irving, 15 Sim. 437; Maitland *v.* Buckhouse, 16 Sim. 68.]

consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection, and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child. Whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child, and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The *primâ facie* presumption is, that it was intended as an advancement to the child and so not falling within the principle of a resulting trust. The natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected, by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it."[1]

[1] Jenkins *v* Pye, 12 Peters, R 253, 254 The opinion of the Court in this case was delivered by Mr Justice Thompson, and immediately preceding the passage cited in the text, he said "But the grounds mainly relied upon to invalidate the deed, were, that being from a daughter to her father, rendered it at least *primâ facie*, void And if not void on this ground, it was so because it was obtained by the undue influence of paternal authority. The first ground of objection seeks to establish the broad principle, that a deed from a child to a parent, conveying the real estate of the child, ought, upon considerations of public policy, growing out of the

§ 310. In the next place, as to the relation of client and attorney or solicitor. It is obvious, that this relation must give rise to great confidence between the parties, and to very strong influences over the actions, and rights, and interests of the client.[1] The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good-nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence, the law, with a wise providence, not only watches over all the transactions of parties in this predicament; but it often interposes to declare transactions void, which, between other persons, would be held unobjectionable.[2]

relation of the parties, to be deemed void; and numerous cases in the English Chancery have been referred to, which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities, we have looked into the leading cases, and cannot discover any thing to warrant the broad and unqualified doctrine contended for on the part of the appellees All the cases are accompanied with some ingredient, showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and sufficient to show reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child; and, in some cases, although there may be circumstances tending, in some small degree, to show undue influence, yet, if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed. It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject, for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed *primâ facie* void."

[1] Walmesley *v.* Booth, 2 Atk. R. 25; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*k*). See, also, Barnesley *v.* Powell, 1 Ves. 284; Bulkley *v.* Wilford, 1 Clark & Finn. R. 102, 177 to 181; Id. 183; Ante, § 218; Edwards *v.* Meyrick, 2 Hare, R. 260, 268.

[2] 1 Madd. Ch. Pr. 94; Welles *v.* Middleton, 1 Cox, R. 112, 125; 3 Peere Will. 131, Cox's note (1); Wright *v.* Proud, 13 Ves. 136; Wood *v.* Downes, 18 Ves. 126; Ante, § 219.

It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties.[1] By establishing the principle, that while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former;[2] it supersedes the necessity of any inquiry into the particular means, extent, and exertion of influence in a given case, a task often difficult, and ill supported by evidence, which can be drawn from any satisfactory sources.[3] This doctrine is not necessarily limited to

[1] Wood *v.* Downes, 18 Ves. 126; Ante, § 219, De Montmorency *v.* Devereaux, 7 Clark and Finnel. 188.

[2] Wood *v.* Downes, 18 Ves. 126; Jones *v.* Tripp, Jac. Rep. 322; Goddard *v.* Carlisle, 9 Price, R. 169; Edwards *v.* Meyrick, 2 Hare, R. 68.

[3] See Welles *v.* Middleton, 1 Cox, R. 125; Wright *v.* Proud, 13 Ves. 137. See Cheslyn *v.* Dalby, 2 Younge & Coll. 194, 195. In the case of Hunter *v.* Atkins, (3 M. & Keen, 113,) Lord Brougham made the following remarks on this subject: "There is no dispute upon the rules which, generally speaking, regulate cases of this description. Mr. Alderman Atkins is either to be regarded in the light of an agent, confidentially intrusted with the management of Admiral Hunter's concerns, a person at least, in whom he reposed a very special confidence, or he is not. If he is not to be so regarded, then a deed of gift, or other disposition of property in his favor, must stand good, unless some direct fraud were practised upon the maker of it, unless some fraud, either by misrepresentation or by suppression of facts, misled him, or he was of unsound mind when the deed was made. If the alderman did stand in a confidential relation towards him, then the party, seeking to set aside the deed, may not be called upon to show direct fraud; but he must satisfy the Court, by the circumstances, that some advantage was taken of the confidential relation in which the alderman stood. If the alderman stood towards the admiral in any of the known relations of guardian and ward, attorney and client, trustee and

cases where the contract or other transaction respects the rights or property in controversy, in the particular suit in respect to which the attorney or solicitor is ad-

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cestui que trust, &c., then in order to support the deed, he ought to show that no such advantage was taken; that all was fair; that he received the bounty freely and knowingly on the giver's part, and as a stranger might have done. For I take the rule to be this: There are certain relations known to the law, as attorney, guardian, trustee; if a person, standing in these relations to client, ward, or *cestui que trust*, takes a gift or makes a bargain, the proof lies upon him, that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done, taking no advantage of his influence or knowledge, putting the other party on his guard, bringing every thing to his knowledge, which he himself knew. In short, the rule, rightly considered, is, that the person standing in such relation must, before he can take a gift, or even enter into a transaction, place himself exactly in the same position as a stranger would have been in; so that he may gain no advantage whatever from his relation to the other party, beyond what may be the natural and unavoidable consequence of kindness arising out of that relation. A client, for example, may naturally entertain a kindly feeling towards an attorney or solicitor, by whose assistance he has long benefited; and he may fairly and wisely desire to benefit him by a gift, or without such an intention being the predominating motive, he may wish to give him the advantage of a sale or a lease. No law, that is tolerable among civilized men, men who have the benefits of civility without the evils of excessive refinement and overdone subtlety, can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to show that deception was practised, or that the attorney or solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself. In a word, standing in the relation in which he stands to the other party, the proof lies upon him (whereas, in the case of a stranger, it would lie on those who opposed him) to show that he has placed himself in the position of a stranger; that he has cut off, as it were, the connection which bound him to the party giving or contracting; and that nothing has happened which might not have happened had no such connection subsisted. The authorities mean nothing else than this, when they say, as in Gibson *v.* Jeyes (6 Ves. 277,) that attorney and client, trustee and *cestui que trust*, may deal, but it must be at arm's length; the parties putting themselves in the situation of purchasers and vendors, and performing (as the Court said, and, I take leave to observe, not very felicitously, or even very correctly) all the duties of those characters. The authorities mean no more, taken fairly and candidly

vising or acting for his client; but it may extend to other contracts and transactions disconnected therefrom, or at least, where from the attendant circumstance there is reason to presume that the attorney and solicitor possessed some marked influence, ascendency, or other advantage over his client in respect to them.[1]

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towards the Court, when they say, as in Wright *v.* Proud, (15 Ves. 138,) that an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be not only free from fraud, but the most moral in its nature; a *dictum* reduced, in Hatch *v.* Hatch, (9 Ves. 296,) to this, that it is almost impossible for a gift from client to attorney to stand, because the difficulty is extreme of showing that every thing was voluntary and fair, and with full warning and perfect knowledge; for in Harris *v.* Tremenheere, (15 Ves. 40,) the Court only held that, in such a case, a suspicion attaches on the transaction, and calls for minute examination."

[1] See Austin *v.* Chambers, 6 Cl. & Finn. 1; Trevelyan *v.* Charter, 12 Cl. & Finn. 714; Edwards *v.* Meyrick, 2 Hare, R. 60, 68. Mr. Vice-Chancellor Wigram here said: "It was not insisted in argument that a solicitor is under an actual incapacity to purchase from his client. There is not, in that case, the positive incapacity which exists between a trustee and his *cestui que trust;* but the rule the Court imposes is, — that inasmuch as the parties stand in a relation which gives, or may give the solicitor an advantage over the client, — the *onus* lies on the solicitor to prove that the transaction was fair. Montesquieu *v.* Sandys, 18 Ves. 302; Cane *v.* Lord Allen, 2 Dow, 289. The rule is expressed by Lord Eldon (6 Ves. 278. See also Sugden, Vend. & Pur. Vol. 3, p. 238, ed. 10,) to be, that if the attorney 'will mix with the character of attorney that of vendor, he shall, if the propriety of the transaction comes in question, manifest that he has given his client all that reasonable advice against himself that he would have given him against a third person.' It was argued that the rule I have referred to has no application, unless the defendant was the plaintiff's solicitor *in hâc re*, and this argument is no doubt well founded. Jones *v.* Thomas, 2 Y. & Coll. 498; Gibson *v.* Jeyes, 6 Ves. 266, 278. It appears to me, however, that the question, whether Meyrick was the solicitor *in hâc re*, is one rather of words than of substance. The rule of equity, which subjects transactions between solicitor and client to other and stricter tests than those which apply to ordinary transactions, is not an isolated rule, but is a branch of a rule applicable to all transactions between man and man, in which the relation between the contracting parties is such as to destroy the equal footing on which such parties should

§ 311. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and, on the other hand, it is not necessarily void

stand. In some cases, as between trustee and *cestui que trust*, the rule goes to the extent of creating a positive incapacity; the duties of the office of trustee requiring, on general principles, that that particular case should be so guarded. The case of solicitor and client is, however, different. In the case of Gibson *v.* Jeyes, there was evidence that the client was of advanced age, and of much infirmity, both of mind and body, that the consideration was inadequate, — and of various other circumstances. Lord Eldon there shows how each of these circumstances gave rise to its appropriate duty on the part of the attorney. In other cases, where an attorney has been employed to manage an estate, he has been considered as bound to prove that he gave his employer the benefit of all the knowledge which he had acquired in his character of manager or professional agent, in order to sustain a bargain made for his own advantage. Cane *v.* Lord Allen, 2 Dow, 294. But as the communication of such knowledge by the attorney will place the parties upon an equality, — when it is proved that the communication was made, the difficulty of supporting the transaction is *quoad hoc* removed. If, on the other hand, the attorney has not had any concern with the estate respecting which the question arises, the particular duties to which any given situation of confidence might give rise, cannot of course attach upon him, whatever may be the other duties which the mere office of attorney may impose. If the attorney, being employed to sell, becomes himself the purchaser, his duties and his interests are directly opposed to each other, and it would be difficult, — and without the clearest evidence that no advantage was taken by the attorney of his position, and that the vendor had all the knowledge which could be given him in order to form a judgment, it would be impossible — to support the transaction. In other cases the relation between the parties may simply produce a degree of influence and ascendency, placing the client in circumstances of disadvantage; as where he is indebted to the attorney, and is unable to discharge the debt. The relative position of the parties, in such a case, must at least impose upon the attorney the duty of giving the full value for the estate, and the *onus* of proving that he did so. If he proves the full value to have been given, the ground for any unfavorable inference is removed. The cases may be traced through every possible variation until we reach the simple case where, though the relation of solicitor and client exists in one transaction, and, therefore, personal influence or ascendency may operate in another, yet the relation not existing *in hâc re*, the rule of equity to which I am now adverting may no longer apply. The nature of the proof, therefore, which the Court requires, must depend upon the

throughout, *ipso facto*.[1] But the burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other.[2] If no such proof is esta-

circumstances of each case, according as they may have placed the attorney in a position in which his duties and his pecuniary interests were conflicting, or may have given him a knowledge which his client did not possess, or some influence, or ascendency, or other advantage over his client; or, notwithstanding the existence of the relation of attorney and client, may have left the parties substantially at arm's length, and on an equal footing; this seems deducible from the cases. Gibson *v.* Jeyes; Hatch *v.* Hatch, 9 Ves. 292; Welles *v.* Middleton, 1 Cox, 112; S. C. cited 18 Ves. 127; Wood *v.* Downes, 18 Ves. 120; Bellew *v.* Russell, 1 Ba. & Be. 96; Montesquieu *v.* Sandys; Cane *v.* Lord Allen; Hunter *v.* Atkins, 3 Myl. & K. 113. I have, therefore, to consider the position in which these parties actually stood to each other. And I certainly am not treating the case of the plaintiff too strictly when I exclude all considerations which the bill does not state as having existed; and, according to the statements in the bill, it does not appear that the defendant had any peculiar or exclusive knowledge of these particular farms or the value of them, or that he had undertaken any particular duties respecting them, which were opposed to his becoming a purchaser. No equity appears to me to arise, except that which might arise from the mere possibility of the relation of attorney and client, giving the attorney some influence or ascendency over the client, and the circumstance that the plaintiff was pressed by him to pay his bill of costs. On the evidence in the cause I am satisfied that the only ground upon which I can proceed, is this bare relation between the parties. Taking the obligations of the defendant to stand as high as the relative position of the parties enable me to place them, — admitting the defendant to be the attorney *in hâc re*, — I cannot consider that he is bound to do more than prove that he gave the full value for the estate." Post, § 313.

[1] Howell *v.* Ransom, 11 Paige, 538; Evans *v.* Ellis, 5 Denio, 640.

[2] Gibson *v.* Jeyes, 6 Ves. 278; Montesquieu *v.* Sandys, 18 Ves. 313; Bellew *v.* Russell, 1 B. & Beatty, R. 104, 107; Harris *v.* Tremenheere, 15 Ves. 34, 39; Cane *v.* Lord Allen, 2 Dow, R. 289, 299; Edwards *v.* Meyric, 2 Hare, R. 60. The like rule applies to counsel employed as a

blished, Courts of Equity treat the case as one of constructive fraud.[1] In this respect there is said to be a distinction between the case of an attorney and client, and that of a trustee and *cestui que trust*. In the former, if the attorney, retaining his connection, contracts with his client, he is subject to the *onus* of proving that no advantage has been taken of the situation of the latter. But in the case of a trustee, it is not sufficient to show that no advantage has been taken; but the *cestui que trust* may set aside the transaction at his own option.[2] The reason of this distinction, which savors somewhat of nicety, if not of subtilty, seems to be, that in the case of clients the rule is general and applicable to all contracts, conveyances, and negotiations between the attorney and client, and is not limited to the property about which the attorney is retained, or the suit in which he is acting. In the case of a trustee, the rule giving the *cestui que trust* an option, is limited to the purchase of the first property, and as to other property it would seem that the rule is the same as in other fiduciary relations, that

confidential adviser; for he is disabled from purchasing, for his own benefit charges on his client's estate without his permission; and the disability will continue as long as the reason exists, although the confidential employment may have ended. Carter *v.* Palman, 8 Clark & Finnel. 657, 706.

[1] See Jones *v.* Thomas, 2 Y. & Coll. 498. In this case it was held, that where an account is decreed to be taken between an attorney and his client, in the course of which the attorney has taken securities from the client, the attorney must not only prove the securities, but the consideration for which they were given. Champion *v.* Rigby, 1 Russ. & Mylne, 539.

[2] Cane *v.* Lord Allen, 2 Dow, 289, 299; Post, § 322. See the remarks of Lord Brougham, in Hunter *v.* Atkins, 3 Mylne & Keen, R. 113; Ante, § 310, note, where he seems to put the cases of client and attorney, guardian and ward, trustee and *cestui que trust*, upon the same general footing, and is governed by the same rule. The same distinction is stated in Edwards *v.* Meyrick, 2 Hare, R. 60, 68, 69; Ante, § 310, note.

only shifts the burden of proof from the seller to the buyer, to show the entire fairness of the transaction; or leaves the seller to establish presumptively that there has been some irregularity in the bargain, or some influence connected with the relation under which it has been made.[1]

§ 312. Thus, if a bond is obtained by an attorney, from a client who is poor and distressed, and it does not appear to be for a full and fair consideration, it will be set aside, as obtained by undue influence from his station.[2] Upon a like ground, a bond taken by an attorney from his client for a specific sum, will not be allowed to stand as a security, except for the amount of fees and charges due to the attorney; for it is the general policy of Courts of Justice, in cases between client and attorney, to protect the suitors, and not to suffer any advantage to be taken of them by securities of this sort.[3] And for the same reason, a judgment, obtained by a solicitor against his client for security for costs, will be overhauled, even after a considerable lapse of time.[4] So, a gift made to an attorney, *pendente lite*, (for it would be otherwise if the relation had completely ceased,) will be set aside as arising from the exercise of improper influence;[5] for it has been said, with great force, that there would be

[1] See Post, § 313; Montesquieu *v.* Sandys, 18 Ves. R. 302, 318.

[2] Proof *v.* Hines, Cas. T. Talb. 111; Walmesley *v.* Booth, 2 Atk. 29.

[3] Newman *v.* Payne, 4 Bro. Ch. R. 350.; S. C. 2 Ves. jr. 200; Langstaffe *v.* Taylor, 14 Ves. 262; Wood *v.* Downes, 18 Ves. 120, 127; Pitcher *v.* Rigby, 9 Price, R. 79; Jones *v.* Roberts, 9 Beavan, R. 419.

[4] Drapers' Company *v.* Davis, 2 Atk. 295.

[5] Oldham *v.* Hand, 2 Ves. 259; Welles *v.* Middleton, 1 Cox, 112, 125; Harris *v.* Tremenheere, 15 Ves. 34; Wood *v.* Downes, 18 Ves. 120, 127; Morse *v.* Royal, 12 Ves. 371.

no bounds to the crushing influence of the power of an attorney, who has the affairs of a man in his hand, if it were not so.[1] And sales made, and annuities granted to attorneys, under similar circumstances, will, upon the same principles of public policy, be set aside, at least, unless they are established to have been transacted *uberrimâ fide*.[2]

§ 313. Indeed, the general principle is so well established, that Lord Eldon, on one occasion, said: "It is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty."[3] But, where the relation is completely dissolved, and the parties are no longer under the antecedent influence, but deal with each other at arm's

[1] Welles *v.* Middleton, 1 Cox, R. 125; Hatch *v.* Hatch, 9 Ves. 292, 296.

[2] Harris *v.* Tremenheere, 15 Ves. 34; Gibson *v.* Jeyes, 6 Ves. 266; Wood *v.* Downes, 18 Ves. 120; Bellew *v.* Russell, 1 Ball & Beatt. 104.

[3] Hatch *v.* Hatch, 9 Ves. 296, 297. — Mr. Maddock, in 1 Madd Ch. Pr. 95, note (*f*), has suggested, that, what is said as to an attorney, in Morse *v.* Royal, 12 Ves. 371, and in Wright *v.* Proud, 13 Ves. 138, does not seem warranted by the authorities. I confess myself at a loss precisely to understand what Mr. Maddock intended by this remark. Surely, he could not mean to say, that a gift to an attorney, while that relation continued, could not be avoided, unless fraud or imposition were proved; for that would be contradicted by the doctrine maintained in several cases. Welles *v.* Middleton, 1 Cox, R. 125; Hatch *v.* Hatch, 9 Ves. 296, 297; Gibson *v.* Jeyes, 6 Ves. 276; Wood *v.* Downes, 18 Ves. 123; Oldham *v.* Hand, 2 Ves. 259; Montesquieu *v.* Sandys, 18 Ves. 313. See also Bellew *v.* Russell, 1 Ball & Beat. R. 104, 107; Harris *v.* Tremenheere, 14 Ves. 31, 42; Walmsley *v.* Booth, 2 Atk. 29, 30. See also Wendell *v.* Van Rensellaer, 1 Johns. Ch. R. 350; Hylton *v.* Hylton, 2 Ves. 547, as cited by Lord Eldon, 18 Ves. 126; Newland on Contracts, ch. 31, p. 453, &c.; Welles *v.* Middleton, 1 Cox, R. 125; 18 Ves. 126.

length, there is no ground to apply the principle, and they stand upon the rights and duties common to all other persons.[1] And the same rule will or may apply, where the transaction is totally disconnected with the relation, and concerns objects and things, not embraced in, or affected by, or dependent upon, that relation;[2] and there is an absence of all other circumstances, which may create a just suspicion as to the integrity and fairness of the transaction.

§ 314. Similar considerations apply to the case of a medical adviser and his patient.[3] For it would be a meagre sort of justice to say, that the sort of policy which has induced the Court to interfere between client and attorney, should be restricted to such cases; since as much mischief might be produced, and as much fraud and dishonesty be practised, if transactions were permitted to stand, which arose between parties in equally confidential relations.[4]

§ 315. In the next place, the relation of principal and agent. This is affected by the same considerations, as the preceding, founded upon the same enlightened public policy.[5] In all cases of this sort the prin-

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[1] Gibson *v.* Jeyes, 6 Ves. 277; Oldham *v.* Hand, 2 Ves. 259; Montesquieu *v.* Sandys, 18 Ves. 313; Walmesley *v.* Booth, 2 Atk. 29, 30; Wood *v.* Downes, 18 Ves. 126, 127.

[2] Montesquieu *v.* Sandys, 18 Ves. 313; Newland on Contracts, ch. 31, p. 456, 457, 458; Howell *v.* Baker, 4 Johns. Ch. R. 118; Edwards *v.* Meyrick, 2 Hare, R. 60, 68; Jones *v.* Thomas, 2 Younge & Coll. 498; Gibson *v.* Jeyes, 6 Ves. R. 266, 278; Ante, § 310.

[3] See Billing *v.* Southee, 10 Eng. Law & Eq. R. 37; Crispell *v.* Dubois, 4 Barbour, 393.

[4] Dent *v.* Bennett, 2 Keen, R. 539; S. C. 4 Mylne & Craig, 269, 276, 277; Gibson *v.* Russell, 2 Younge & Coll. N. R. 104; S. C. The Jurist (English) Oct. 7th, 1843, p. 875. But see Pratt *v.* Barker, 1 Sim. R. 1.

[5] 1 Fonbl. Eq. B. 1, ch. 3, § 12, note (*k*); Benson *v.* Heathom, 1 Younge & Coll. N. R. 326.

cipal contracts for the aid and benefit of the skill and judgment of the agent; and the habitual confidence reposed in the latter, makes all his acts and statements possess a commanding influence over the former. Indeed, in such cases, the agent too often so entirely misleads the judgment of his principal, that while he is seeking his own peculiar advantage, he seems but consulting the advantage and interests of his principal; placing himself in the odious predicament so strongly stigmatized by Cicero: *Totius autem injustitiæ nulla capitalior est, quam eorum, qui, cum maxime fallunt, id agunt, ut viri boni esse videantur.*[1] It is, therefore, for the common security of all mankind, that gifts procured by agents, and purchases made by them, from their principals, should be scrutinized with a close and vigilant suspicion.[2] And, indeed, considering the abuses, which may attend any dealings of this sort between principals and agents, a doubt has been expressed, whether it would not have been wiser for the law in all cases to have prohibited them; since there must almost always be a conflict between duty and interest on such occasions.[3] Be this as it may, it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals; or, by abusing their confidence, to acquire unreasonable gifts or advantages;[4] or, indeed, to deal validly with

[1] Cic. de Offic. Lib. 1, ch. 13; Huguenin v. Basley, 14 Ves. 284.

[2] See Neeley v. Anderson, 2 Strobh. Eq. R. 262; Brooke v. Berry, 2 Gill, 83.

[3] Dunbar v. Tredennick, 2 B. & Beatty, R. 319; Notris v. Le Neve, 3 Atk. R. 38.

[4] See Church v. Mar. Ins. Co. 1 Mason, R. 341; Barker v. Mar. Ins. Co. 2 Mason, R. 369; Woodhouse v. Meredith, 1 Jac. & Walk. 204,

their principals in any cases, except where there is the most entire good faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition.[1]

§ 316. Upon these principles, if an agent sells to his principal his own property, as the property of another, without disclosing the fact, the bargain, at the election of the principal, will be held void.[2] So, if an agent, employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer.[3] Therefore, if a person is employed as an agent, to purchase up a debt of his employer, he cannot purchase the debt upon his own account, for he is bound to purchase it at as low a rate as he can; and he would otherwise be tempted to violate his duty.[4] The same rule applies to a surety, who purchases up the debt of his principal. And, therefore, in each case,

222; Massey *v.* Davies, 2 Ves. jr. 318; Crowe *v.* Ballard, 3 Bro. Ch. R. 120; Lees *v.* Nuttall, 1 Russ. & Mylne, 53; S. C. 1 Tamlyn, R. 282.

[1] See Crowe *v.* Ballard, 3 Bro. Ch. R. 117; Purcell *v.* Macnamara, 14 Ves. 91; Huguenin *v.* Basley, 14 Ves. 273; Watt *v.* Grove, 2 Sch. & Lefr. 492; Fox *v.* Mackreth, 2 Bro. Ch. R. 400; S. C. 2 Cox, R. 320; Coles *v.* Trecothick, 9 Ves. 246; Lowther *v.* Lowther, 13 Ves. 102, 103; Seley *v.* Rhodes, 2 Sim. & Stu. R. 49; Morret *v.* Paske, 2 Atk. 53; Green *v.* Winter, 1 Johns. Ch. R. 27; Parkist *v.* Alexander, 1 Johns. Ch. R. 391. — The case of Gray *v.* Mansfield, 1 Ves. R. 379, has been very justly doubted by Mr. Belt as not consistent with established principles. See Belt's Supplement, 167.

[2] Gillett *v.* Peppercorne, 3 Beav. R. 78, 83, 84.

[3] Lees *v.* Nuttall, 1 Russ. & M. 53; S. C. 1 Tamlyn, R. 282; Post, § 327; Taylor *v.* Salmon, 2 Mees. & Cromp. 139; S. C. 4 Mylne & Craig, 139; Torrey *v.* Bank of New Orleans, 9 Paige, R. 619; Van Epps *v.* Van Epps, 9 Paige, R. 327; Cram *v.* Mitchell, 1 Sandf. 251; Dobson *v.* Racey, 3 Sandf. 61; Voorhees *v.* Presbyterian Ch. 8 Barbour, 136; Post, § 1201 *a*, § 1211 *a*.

[4] Reed *v.* Norris, 2 Mylne & Craig, 361, 374.

if a purchase is made of the debt, the agent or surety can entitle himself, as against his principal, to no more than he has actually paid for the debt.[1] So, if an agent discover a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; if he do, he will be held a trustee for his principal.[2]

§ 316 *a*. In all cases of purchases and bargains respecting property, directly and openly made between principals and agents, the utmost good faith is required. The agent must conceal no facts within his knowledge, which might influence the judgment of his principal, as to the price or value; and, if he does, the contract will be set aside.[3] The question in all such cases does not turn upon the point, whether there is any intention to cheat or not; but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure.[4] Of course, upon the principles already stated, if the relation of principal and agent has wholly ceased, the parties are restored to their common competency to deal with each other. It is also to be understood as a just qualification of the whole doctrine, that the principal may, at his election, deem the bargain made or act done by his agent valid or not; and that the agent cannot himself avoid it on that ground.[5]

§ 317. In the next place, as to the relation of guardian and ward. In this most important and delicate of trusts the same principles prevail, and with

[1] Reed *v.* Norris, 2 Mylne & Craig, 361, 374.
[2] Rengo *v.* Binns, 10 Peters, R. 269.
[3] Farnam *v.* Brooks, 9 Pick. R. 212.
[4] Ibid.
[5] Story on Agency, § 210, and cases there cited.

a larger and more comprehensive efficiency. It is obvious, that, during the existence of the guardianship, the transactions of the guardian cannot be binding upon the ward, if they are of any disadvantage to him; and, indeed, the relative situation of the parties imposes a general inability to deal with each other.[1] But Courts of Equity proceed yet farther in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, and the relation become thereby actually ended, if the intermediate period be short,[2] unless the circumstances demonstrate, in the highest sense of the terms, the fullest deliberation on the part of the ward, and the most abundant good faith (*uberrima fides*) on the part of the guardian. For, in all such cases, the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased; as, if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian.[3]

§ 318. Lord Hardwicke has expounded the general ground of this doctrine in a clear manner. "Where," (says he) "a man acts as a guardian, or trustee, in na-

[1] See 3 P. Will. 131, Cox's note (1); 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*), 1 Madd. Ch. Pr. 102, 103; Dawson *v.* Massey, 1 B. & Beatt. R. 226; See Bostwick *v.* Atkins, 3 Const. 53; Blackmore *v.* Shelby, 8 Humph. 439.

[2] See Richardson *v.* Linney, 7 B. Monroe, 571; Andrews *v.* Jones, 10 Ala. 400.

[3] Bawson *v.* Massey, 1 B. & Beatt. R. 229; Wright *v.* Proud, 13 Ves. 136; Wedderburn *v.* Wedderburn, 4 Mylne & Craig, 41.

ture of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward's coming of age, and at the time of settling accounts, or delivering up the trust; because an undue advantage may be taken. It would give an opportunity, either by flattery, or force, by good usage unfairly meant, or by bad usage imposed, to take such an advantage. And, therefore, the principle of the Court is of the same nature with relief in this Court on the head of public utility; as in bonds obtained from young heirs; and rewards given to an attorney pending a cause; and marriage-brokage bonds. All depends upon public utility; and, therefore, the Court will not suffer it, though, perhaps, in a particular instance, there may not be an actual unfairness." [1] His Lordship afterwards added: "The rule of the Court, as to guardians, is extremely strict, and in some cases does infer some hardship; as, where there has been a great deal of trouble, and he has acted fairly and honestly, that yet he shall have no allowance. But the Court has established, that on great utility, and on necessity, and on this principle of humanity, that it is a debt of humanity that one man owes to another; as every man is liable to be in the same circumstances." [2]

§ 319. Lord Eldon has expressed himself even in a more emphatic manner on this subject. "There may not be," (says he) "a more moral act, one that would do more credit to a young man, beginning the

[1] Hylton *v.* Hylton, 2 Ves. 548, 549; Pierce *v.* Waring, cited ibid. and in 1 Ves. 380; 1 P. Will. 120, Cox's note; 1 Cox, R. 125; Wright *v.* Proud, 13 Ves. 136, 138; Wood *v.* Downes, 18 Ves. 126.

[2] Hylton *v.* Hylton, 2 Ves. 548, 549.

world, or afford a better omen for the future than, if a trustee having done his duty, the *cestui que trust*, taking into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given; and recollecting that in discussing, whether it is an act of rational consideration, an act of pure volition uninfluenced, that inquiry is so easily baffled in a Court of Justice; that, instead of the spontaneous act of a friend uninfluenced, it may be the impulse of a mind, misled by undue kindness, or forced by oppression; and the difficulty of getting property out of the hands of the guardian or trustee thus increased. And, therefore, if the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases, it will lend its assistance to fraud, where the connection is not dissolved, the account not settled, every thing remaining pressing upon the mind of the party under the care of the guardian or trustee."[1] The same principles are applied to persons standing in the situation of *quasi* guardians or confidential advisers.[2]

§ 320. In the cases to which these principles have been applied, in order to set aside grants and other transactions between guardian and ward, two circumstances of great importance have generally concurred; first, that the grants and transactions have taken place immediately upon the ward's attaining age; and, secondly, that the former influence of the guardian

[1] Hatch *v.* Hatch, 9 Ves. 297.
[2] Revett *v.* Harvey, 1 Sim. & Stu. R. 502.

has been demonstrated to exist to an undue degree; or in other words, that the parties have not met upon equal terms.[1] If, therefore, the relation has entirely ceased, not merely in name, but in fact, and if sufficient time has elapsed to put the parties in complete independence as to each other; and if a full and fair settlement of all transactions growing out of the relation, has been made, there is no objection to any bounty or grant conferred by the ward upon his guardian.[2] Indeed, in such cases, it is only the performance of a highly moral duty, recommended, as well by law, as by natural justice.

§ 321. In the next place, with regard to the relation of trustee and *cestui que trust*, or rather beneficiary, or fide-commissary, as we could wish the person beneficially interested might be called, to escape from the awkwardness of a barbarous foreign idiom.[3] In this class of cases the same principles govern, as in cases

[1] See Dawson *v.* Massey, 1 B. & Beatt. 229, 232, 236; Aylward *v.* Kearney, 2 B. & Beatt. R. 463.

[2] Hylton *v.* Hylton, 2 Ves. 517, 549.

[3] The phrase, *Cestui que trust*, is a barbarous Norman law French phrase; and is so ungainly and ill adapted to the English idiom, that it is surprising, that the good sense of the English legal profession has not long since banished it, and substituted some phrase in the English idiom, furnishing an analogous meaning. In the Roman law the trustee was commonly called *Hæres Fiduciarius;* and the *Cestui que trust*, *Hæres Fidei-Commissarius*, which Dr. Halifax has not scrupled to translate *Fide-Committee*. (Halifax, Anal. of Civil Law, ch. 6, § 16, p. 31; Id. ch. 8, § 2, 3, p. 45, 46.) I prefer Fide-commissary, as at least equally within the analogy of the English language. But Beneficiary, though a little remote from the original meaning of the word, would be a very appropriate word, as it has not, as yet, acquired any general use in a different sense. *Hæres fidei commissarius* was sometimes used in the Civil Law, to denote the trustee. See *Vicat, Vocab. voce, Fidei commissarius.* The French Law calls the *Cestui que trust*, *Fidei commissaire.* See Ferriere

of guardian and ward, with at least as much enlarged liberality of application, and upon grounds quite as comprehensive. Indeed, the cases are usually treated as if they were identical.[1] A trustee is never permitted to partake of the bounty of the party, for whom he acts, except under circumstances which would make the same valid, if it were a case of guardianship. A trustee cannot purchase of his *cestui que trust*, unless under like circumstances; or, to use the expressive language of an eminent Judge, a trustee may purchase of his *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such,[2] after a jealous and scrupulous examination of all the circumstances; and it is clear, that the *cestui que trust* intended, that the trustee should buy; and there is no fraud, no concealment, and no advantage taken by the trustee of information, acquired by him as trustee.[3] But it is difficult to make out such a case, where the exception is taken, especially when there is any inadequacy of price or any inequality in the bargain.[4] And, there-

Dict. voce, *Fidei commissaire.* Merlin, Repertoire, voce, *Substitution, et Substitution fidei commissaire.* Dr. Brown uses the word, Fidei commissary, 1 Brown, Civil Law, 190, note.

[1] Hatch *v.* Hatch, 9 Ves. 292, 296, 297; Newland on Contracts, ch. 32, p. 459, &c.; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 3, p. 112, &c.; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*h*); Farnum *v.* Brooks, 9 Pick. R. 212. See also Bulkley *v.* Wilford, 2 Clark & Fin. R. 102, 177 to 183; Ante, § 317, 320.

[2] See Dobson *v.* Racey, 3 Sandf. 61; Brackenridge *v.* Holland, 2 Blackf. 377; Poillon *v.* Martin, 1 Sandf. 569; Stuart *v.* Kissam, 2 Barb. 491.

[3] See Brannan *v.* Oliver, 2 Stuart, 47; Julian *v.* Reynolds, 8 Alabama, 680; Stallings *v.* Freeman, 2 Hill, ch. R. 401; Pratt *v.* Thornton, 28 Maine, 335. But see McCartney *v.* Calhoun, 17 Ala. 301; Marshall *v.* Stevens, 8 Humph. 159; Beeson *v.* Beeson, 9 Barr, 279; McKinley *v.* Irvine, 13 Ala. 681.

[4] Ante, § 310; Coles *v.* Trecothick, 9 Ves. 216; Fox *v.* Mackreth,

fore, if a trustee, though strictly honest, should buy for himself an estate of his *cestui que trust*, and then should sell it for more, according to the rules of a Court of Equity, from general policy, and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not to be permitted to sell to or for himself.[1]

§ 322. But we are not to understand, from this last language, that, to entitle the *cestui que trust* to relief, it is indispensable to show that the trustee has made some advantage, where there has been a purchase by himself; and that, unless some advantage has been made, the sale to the trustee is good. That would not be putting the doctrine upon its true ground, which is, that the prohibition arises from the subsisting relation of trusteeship.[2] The ingredient of advantage made by him would only go to establish, that the transaction might be open to the strong imputation of being tainted by imposition or selfish cunning.[3] But the principle applies, however innocent the purchase may be, in a given case.[4] It is poisonous in its conse-

2 Bro. Ch. R. 400; Gibson *v.* Jeyes, 277; Whichcote *v.* Lawrence, 3 Ves. 710; Campbell *v.* Walker, 5 Ves. 678; Ayliffe *v.* Murray, 2 Atk. R. 59; Hawley *v.* Cramer, 4 Cowen, R. 717, Van Epps *v.* Van Epps, 9 Paige, R. 207; Scott *v.* Davis, 4 Mylne & Craig, 87.

[1] See Fox *v.* Mackreth, 2 Brown, Ch. R. 400; S. C. 2 Cox, R. 320, 327; Prevost *v.* Gratz, 1 Peters, Cir. R. 367, 368; S. C. 6 Wheat. R. 481; Hamilton *v.* Wright, 6 Clark & Fin. 111, 133; Edward *v.* Meyrick, 2 Hare, R. 60, 68; Hawley *v.* Cramer, 4 Cowen, R. 717. *Quære*, does the doctrine extend to all purchases made by a trustee from the *cestui que trust*, or is it limited to purchases of the trust estate?

[2] See Newland on Contracts, ch. 32, p. 461; Ex parte Lacey, 6 Ves. 625, 626; 1 Madd. Ch. Pr. 92, 93; Chesterfield *v.* Janssen, 2 Ves. 138.

[3] See Campbell *v.* Walker, 5 Ves. 678; 13 Ves. 601.

[4] Ex parte James, 8 Ves. 337, 345; Ex parte Bennett, 10 Ves. 381, 385; Cane *v.* Lord Allen, 2 Dow, R. 289, 299; Dobson *v.* Racey, 3 Sandf. 61; Slade *v.* Van Vechten, 11 Paige, 21; Ante, § 311.

quences. The *cestui que trust* is not bound to prove, nor is the Court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be so; and yet the party not have it in his power distinctly and clearly to show it. There may be fraud; and yet the party not be able to show it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does, and will permit the *cestui que trust* to come at his own option, and, without showing essential injury, to insist upon having the experiment of another sale.[1] So that in fact, in all cases, where a purchase has been made by a trustee on his own account of the estate of his *cestui que trust*, although sold at public auction, it is in the option of the *cestui que trust*, to set aside the sale, whether *bonâ fide* made or not.[2] So a trustee will not be permitted to obtain any profit or advantage to himself in managing the concerns of the *cestui que trust*, but whatever benefits or profits are obtained, will belong exclusively to the *cestui que trust*.[3] In short, it may be laid down as a general rule, that a trustee is bound not to do any thing, which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it.[4] And this doctrine applies,

[1] Davone *v.* Fanning, 2 Johns. Ch. Rep. 252, where Mr. Chancellor Kent has examined the cases with a most exemplary diligence. Ex parte Bennett, 10 Ves. 381, 385, 386; Ante, § 311; Michaud *v.* Girod, 4 Howard, Sup. Ct. R. 503.

[2] Campbell *v.* Walker, 5 Ves. 678, 680; 13 Ves. 601; Ex parte Lacey, 6 Ves. 625; Ex parte Bennett, 10 Ves. 381, 385, 386; Morse *v.* Royal, 12 Ves. 355; Whitcomb *v.* Minchin, 5 Madd. R. 91; Belt's Supplement, p. 11, 12.

[3] Saagar *v.* Wilson, 4 Serg. & Watts, 102.

[4] Hamilton *v.* Wright, 9 Clark & Finnell. R. 111, 123.

not only to trustees strictly so called, but to other persons standing in like situation; such as assignees and solicitors of a bankrupt or insolvent estate, who are never permitted to become purchasers at the sale of the bankrupt or insolvent estate.[1] It applies in like manner to executors and administrators, who are not permitted to purchase up the debts of the deceased on their own account; but, whatever advantage is thus derived by them, by purchases at an undue value, is for the common benefit of the estate.[2] Indeed, the doctrine may be more broadly stated; that executors or administrators will not be permitted, under any circumstances,[3] to derive a personal benefit from the manner, in which they transact the business, or manage the assets, of the estate.[4] And if a trustee misapply the funds of his *cestui que trust* or beneficiary, and purchase a judgment or other security therewith, the latter has

[1] Ex parte Lacey, 6 Ves. 625; Ex parte James, 8 Ves. 337; Ex parte Bennett, 10 Ves. 381; Davoue *v.* Fanning, 2 Johns. Ch. R. 252; Lady Ormond *v.* Hutchinson, 13 Ves. 47; Harrison *v.* Monk, 10 Ala. 185; Cram *v.* Mitchell, 1 Sandf. Ch. 251; Farnam *v.* Brooks, 9 Pick. 202.

[2] Ex parte Lacey, 6 Ves. 628; Ex parte James, 8 Ves. 346; Green *v.* Winter, 1 Johns. Ch. R. 27; Forbes *v.* Ross, 2 Bro. Ch. R. 430; Hawley *v.* Mancius, 7 Johns. Ch. R. 174.

[3] Green *v.* Sargent, 23 Verm. 466.

[4] Schieffelin *v.* Stewart, 1 Johns. Ch. R. 620; Brown *v.* Brewerton, 4 Johns. Ch. R. 303; 4 Dow, Parl. R. 131; Evartson *v.* Tappan, 1 Johns. Ch. R. 497; Hawley *v.* Mancius, 7 Johns. Ch. R. 174; Cook *v.* Coolingridge, Jac. R. 607, 621; Ward *v.* Smith, 3 Sandf. 592; Michaud *v.* Girod, 4 How. U. S. R. 504; Painter *v.* Henderson, 7 Barr, 48; Jeremy on Equity Jurisd. B. 1, ch. 1, § 3, p. 142, &c.; 1 Fonbl. Eq. B. 2, ch. 7, § 6, note (*p*); Id. § 7, and note (*r*). Trustees are not voluntarily allowed a compensation in England for their services, unless specially provided for in the creation of the trust; but their duties and services are treated as gratuitous and honorary. A different rule prevails in many, if not all of the States of this Union. See Post, § 1268.

an election to take such judgment or security or to call upon the trustee to make good the original fund.[1]

§ 323. There are many other cases of persons, standing, in regard to each other, in the like confidential relations, in which similar principles apply. Among these may be enumerated the cases, which arise from the relation of landlord and tenant, of partner and partner, of principal and surety, and various others, where mutual agencies, rights, and duties are created between the parties by their own voluntary acts, or by operation of law. But it would occupy too much space to go over them at large; and most of them are resolvable into the principles already commented on.[2] On the whole, the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests, which he is bound to protect, he will not be permitted to hold any such advantage.[3]

§ 324. The case of principal and surety, however, as a striking illustration of this doctrine, may be briefly referred to. The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either

[1] Steele *v.* Babcock, 1 Hill, (N. Y.) R. 527.

[2] See 1 Hovenden on Frauds, ch. 6, p. 199, 209; Id. vol. 2, ch. 20, p. 153, ch. 21, p. 171; Maddeford *v.* Anstwick, 1 Sim. R. 89; 1 Chitty, Dig. Fraud, vii.; Oliver *v.* Court, 8 Price, R. 127; Farnam *v.* Brooks, 9 Pick. R. 212.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 2, p. 395; Griffiths *v.* Robins, 3 Madd. R. 191.

by surprise, or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety.[1] If any stipulations, therefore, are made between the creditor and the debtor, which are not communicated to the surety, and are inconsistent with the terms of his contract, or are prejudicial to his interests therein, they will operate as a virtual discharge of the surety from the obligation of his contract.[2] And, on the other hand, if any stipulations for additional security, or other advantages, are obtained between the creditor and the debtor, the surety is entitled to the fullest benefit of them.[3]

§ 325. Indeed the proposition may be stated in a more general form; that if a creditor does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit brought against him, if not at law, at all events in Equity.[4]

[1] See Cecil *v.* Plaistow, 1 Anstr. R. 202; Leicester *v.* Rose, 4 East, R. 372; Pidcock *v.* Bishop, 3 B. & Cressw. 605; Owen *v.* Homan, 3 Eng. Law & Eq. R. 121; Smith *v.* Bank of Scotland, 1 Dow, R. 272; Bank of United States *v.* Etting, 11 Wheat. R. 59.

[2] See King *v.* Baldwin, 2 Johns. Ch. R. 554, and the cases there cited; S. C. 17 Johns. R. 384; Bonar *v.* Macdonald, 1 Eng. Law & Eq. R. 1; Nisbet *v.* Smith, 2 Bro. Ch. R. 583.

[3] Hayes *v.* Ward, 4 Johns. Ch. R. 123; Mayhew *v.* Crickett, 2 Swanst. R. 186, and the authorities cited, p. 191, note (*a*); Boultbee *v.* Stubbs, 18 Ves. 23; Ex parte Rushforth, 10 Ves. 409, 421; Post, § 499.

[4] The proposition is thus qualified, because in a variety of cases it is certainly very questionable, whether the defence can be asserted at law; though there is no doubt that it can be asserted in all cases in Equity.

§ 326. It is upon this ground, that if a creditor, without any communication with the surety, and assent on his part, should afterwards enter into any new contract with the principal, inconsistent with the former contract, or should stipulate, in a binding manner, upon a sufficient consideration, for further delay and postponement of the day of payment of the debt, that will operate in Equity as a discharge of the surety.[1] But there is no positive duty incumbent on the creditor, to prosecute measures of active diligence; and, therefore, mere delay on his part, (at least, if some other Equity does not interfere,) unaccompanied by any valid contract, for such delay will not amount to laches, so as to discharge the surety.[2] On the other hand, if the creditor has any security from the debtor, and he parts with it, without communication with the surety, or by his gross negli-

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It has, indeed, been said, by a learned Court, that there is nothing in the nature of a defence by a surety, to make it peculiarly a subject of Equity jurisdiction; and that, whatever would exonerate a surety in one Court, ought to exonerate him in the other. The People *v.* Janssen, 7 Johns. Rep. 332; S. P. 2 Johns. Ch. R. 554, 557. But this doctrine does not seem to be universally adopted; and certainly it has not been acted upon in England to the extent which its terms seem to import. See Theobald on Principal and Surety, p. 117 to 138.

[1] Skip *v.* Huey, 3 Atk. 91; Boultbee *v.* Stubbs, 18 Ves. 20; Ludlow *v.* Simond, 2 Cain. Cas. Err. 1; King *v.* Baldwin, 2 Johns. Ch. R. 554; 17 Johns. R. 384; Ex parte Gifford, 6 Ves. 805; Rees *v.* Berrington, 2 Ves. jr. 510; 2 White & Tudor's Eq. Lead. Cas. 707, and notes; Blake *v.* White, 1 Younge & Coll. 420. Quære, whether a surety on a bond for the fidelity of a party for an indefinite period can, by notice to the obligee, terminate his liability. See Gordon *v.* Gordon, 2 Sim. R. 253; S. C. 4 Russ. R. 581; Bonser *v.* Cox, 6 Beavan, R. 379.

[2] Wright *v.* Simpson, 6 Ves. 734; Heath *v.* Hay, 1 Y. & Jerv. 434; United States *v.* Kirkpatrick, 9 Wheat. R. 720; McLemore *v.* Powell, 12 Wheat. R. 554; Joslyn *v.* Smith, 3 Weston, (Verm.) R. 353.

gence it is lost,[1] that will operate, at least to the value of the security, to discharge the surety.[2]

§ 327. Sureties, also, are entitled to come into a Court of Equity, after a debt has become due, to compel the debtor to exonerate them from their liability, by paying the debt.[3] And although (as we have seen) the creditor is not bound by his general duty to active diligence in collecting the debt, yet it has been said that a surety, when the debt has become due, may come into Equity, and compel the creditor to sue for, and collect the debt from, the principal; at least, if he will indemnify the creditor against the risk, delay, and expense of the suit.[4] But, whether the surety can thus compel the creditor to sue the principal, or not, he has a clear right, upon paying the debt to the principal, to be substituted in the place of the creditor, as to all securities, held by the latter for the debt, and to have the same benefit, that he would have therein.[5] This, however, is not the place to consider at large the general rights and duties of persons standing in the relation of creditors,

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[1] [But see Lang *v.* Brevard, 3 Strobh. Eq. R. 59, where it was held that the neglect of the creditor to record a mortgage given by the principal debtor, to recover the debt, did not discharge the surety. See, also. Pickens *v.* Finney, 12 S. & M. 468, 535.]

[2] Mayhew *v.* Crickett, 2 Swanst. R. 185, 191, and note (*a*); Law *v.* East India Company, 4 Ves. 833; Capel *v.* Butler, 2 Sim. & Stu. R. 457; See also Schroeppell *v.* Shaw, 3 Comst. 460.

[3] Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Lee *v.* Brook, Moseley, R. 318; Cox *v.* Tyson, 1 Turn. & Russ. R. 395.

[4] Hayes *v.* Ward, 4 Johns. Ch. R. 123, 131, 132; King *v.* Baldwin, 2 Johns. Ch. R. 554; S. C. 17 Johns. Rep. 384; Wright *v.* Simpson, 6 Ves. 734; Bishop *v.* Day, 3 Weston, (Verm.) R. 81.

[5] See Langthorne *v.* Swinburne, 14 Ves. 162; Wright *v.* Morley, 11 Ves. 12, 22; Hayes *v.* Ward, 4 Johns. Ch. R. 123.

debtors, and sureties; and we shall have occasion again to advert to the subject, when considering the marshalling of securities in favor of sureties.[1]

§ 328. Let us now pass to the consideration of the third class of constructive frauds, combining, in some degree, the ingredients of the others, but prohibited mainly, because they unconscientiously compromit, or injuriously affect, the private rights, interests, or duties of the parties themselves, or operate substantially as frauds upon the private rights, interests, duties, or intentions of third persons.

§ 329. With regard to this last class, much that has been already stated, under the preceding head of positive or actual fraud, as to unconscionable advantages, overreaching, imposition, undue influence, and fiduciary situations, may well be applied here, although certainly with diminished force, as the remarks there made did not turn exclusively upon constructive fraud.

§ 330. To this same class may also be referred many of the cases arising under the Statute of Frauds,[2] which requires certain contracts to be in writing, in order to give them validity. In the construction of that statute, a general principle has been adopted, that, as it is designed as a protection against fraud, it shall never be allowed to be set up as a protection and support of fraud. Hence, in a variety of cases, where from fraud, imposition, or mistake, a contract of this sort has not been reduced to writing, but has been suffered to rest in confidence or in parol communications between the parties, Courts of Equity will enforce it against the party, guilty of a breach of confidence,

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[1] Post, § 499, 502, 637.

[2] Stat. 29 Charles II., ch. 3, § 1, 4.

who attempts to shelter himself behind the provisions of the statute.[1] Some instances of this sort have been already mentioned: and others again will occur in the subsequent pages.[2]

§ 331. And, here, we may apply the remark, that the proper jurisdiction of Courts of Equity is to take every one's act, according to conscience, and not to suffer undue advantage to be taken of the strict forms of law, or of positive rules.[3] Hence it is, that, even if there be no proof of fraud or imposition; yet, if, upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, Courts of Equity will sometimes interfere and grant relief;[4] although they certainly are very cautious of interfering, unless upon very strong circumstances.[5] But the mere fact, that the bargain is a very hard or unreasonable one, is not, generally, sufficient, *per se*, to induce these Courts to interfere.[6] And, indeed, it will be found, that there are very few cases

[1] See 3 Wooddes. Lect. 57, p. 431, 432; Montecute *v.* Maxwell, 1 P. Will. 619, 620; 1 Eq. Abridg. 19; Attorney-General *v.* Sitwell, 1 Younge & Coll. 583; Ante, § 157, 161, and note.

[2] Ante, § 158; Post, § 374, 752 to 766.

[3] Chesterfield *v.* Janssen, 2 Ves. 137, arguendo.

[4] Nott *v.* Hill, 1 Vern. R. 167, 211; S. C. 2 Vern. 26; Bearry *v.* Pitt, 2 Vern. 14; Chesterfield *v.* Janssen, 2 Ves. 145, 148, 154, 155, 158; Twistleton *v.* Griffith, 1 P. Will. 310; Cole *v.* Gibbons, 3 P. Will. 290; Bowes *v.* Heaps, 3 Ves. & B. 117; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1; Collins *v.* Hare, 2 Bligh, R. 106, N. S.

[5] In some cases of grossly unreasonable contracts, relief may be had, even at law; as in the case of a contract to pay for a horse a barley-corn a nail, doubling it every nail, and there were thirty-two nails in the shoes of the horse. James *v.* Morgan, 1 Lev. 111, cited 2 Ves. 155; 1 Atk. 351, 352; Whalley *v.* Whalley, 3 Bligh, R. 1.

[6] Willis *v.* Jernegan, 2 Atk. 251, 252. See 1 Fonbl. Eq. B. 1, ch. 2, § 10, and note (*h*); Proof *v.* Hines, Cas. T. Talb. 111; Ramsbottom *v.*

not infected with positive or actual fraud, in which they do interfere, except where the parties stand in some very peculiar predicament, and, in some sort, under the protection of the law, from age, or character, or relationship.[1]

§ 332. One of the most striking cases, in which the Courts interfere, is in favor of a very gallant, but strangely improvident class of men, who seem to have mixed up in their character qualities of very opposite natures, and who seem, from their habits, to require guardianship during the whole course of their lives; having at the same time great generosity, credulity, extravagance, heedlessness, and bravery. Of course, it will be at once understood, that we here speak of common sailors, in the mercantile and naval service. Courts of Equity are always disposed to take an indulgent consideration of their interests, and to treat them in the same light with which young heirs and expectants are regarded. Hence it is, that contracts of seamen respecting their wages and prize-money are watched with great jealousy; and are generally relievable whenever any inequality appears in the bargain, or any undue advantage has been taken.[2] It has been remarked, by a learned Judge, that this title

Parker, 6 Maddock, R. 5; 2 Swanston, R. 147. note (*a*), and especially under page 150, the Reporter's citation from Lord Nottingham's MS. of the case of Berney *v.* Pitt, and the remarks of Lord Hardwicke on this case, in 1 Atk. R. 352, and 2 Ves. 157; Freeman *v.* Bishop, 2 Atk. 39.

[1] See Huguenin *v.* Basley, 14 Ves. 271. And see Mr. Swanston's valuable note to Davis *v.* Duke of Marlborough, 2 Swanst. 147, note (*a*); Jeremy on Equity Jurisd. B. 2, Pt. 2, ch. 3, § 4, p. 399; Thornhill *v.* Evans, 2 Atk. R. 330.

[2] See the authorities on the subject of contracts with seamen, fully collected in the work on Contracts, by Prof. Parsons, Vol. I.

to relief arises from a general head of Equity, partly on account of the persons, with whom the transaction is had, and partly on account of the value of the thing purchased.[1] And, he added, that he was warranted in saying, that they were to be viewed in as favorable a light as young heirs are, by what has been often said in cases of this kind, and what has been done by the Legislature itself, which has considered them as a class of men, loose, and unthinking, who will, almost for nothing, part with what they have acquired, perhaps, with their blood.[2]

§ 333. But the great class of cases, in which relief is granted, under this third head of constructive fraud, is that, where the contract or other act is substantially a fraud upon the rights, interests, duties, or intentions of third persons. And, here, the general rule is, that particular persons, in contracts and other acts, shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect to other persons, who stand in such a relation to either, as to be affected by the contract or the consequences of it.[3] And, as the rest of mankind, besides the parties contracting, are

[1] Sir Thomas Clarke, in Howe *v.* Wheldon, 2 Ves. 516, 518; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, p. 401; 3 P. Will. 131, Cox's note (1); Taylor *v.* Rochfort, 2 Ves. 281; Baldwin *v.* Rochfort, 1 Wils. R. 229. — Yet it is obvious, that Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 137, did not contemplate them as entitled to such peculiar protection; for he puts their case as not relievable. "The contracts of sailors, selling their shares before they knew what they were, could not be set aside here." But see the cases in 1 Wilson, R. 229; 2 Ves. 218.

[2] Howe *v.* Wheldon, 2 Ves. 516. See, also, the admirable opinion of Lord Stowell, in the Juliana, 2 Hagg. Adm. Rep. 504. But see Griffith *v.* Spratley, 1 Cox, R. 383.

[3] Per Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 156, 157.

concerned, the rule is properly said to be governed by public utility.[1]

§ 334. It is upon this ground that relief has been constantly granted, in what are called catching bargains with heirs, reversioners, and expectants, during the life of their parents or other ancestors.[2] Many, and, indeed, most of these cases, (as has been pointedly remarked by Lord Hardwicke,) "have been mixed cases, compounded of almost every species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, from weakness on one side, and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons, not privy to the fraudulent agreement. The father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark. The heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor, who has been seduced to leave his estate, not to his heir or

[1] Chesterfield *v.* Janssen, 2 Ves. 156, 157; 1 Madd. Ch. Pr. 97, 98, 99, 214; 1 Eq. Abridg. 90, &c.

[2] 1 Fonbl. Eq. B. 1, ch. 2, § 12, and note (*k*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 397, &c.; Davis *v.* Duke of Marlborough, 2 Swanst. R. 147, 151, 152, 165, 174.

family, but to a set of artful persons, who have divided the spoil beforehand." [1]

§ 335. Strong as this language may appear, it is fully borne out by the general complexion of the cases in which relief has been afforded. Actual fraud, indeed, has not unfrequently been repelled.[2] But there has always been constructive fraud, the nature and circumstances of the transaction being an imposition and deceit upon third persons, who were not parties to it. The relief is founded in part upon the policy of maintaining parental and *quasi* parental authority, and preventing the waste of family estates. It is also founded in part upon an enlarged equity, flowing from the principles of natural justice; upon the equity of protecting heedless and necessitous persons against the designs of that calculating rapacity, which the law constantly discountenances; of succoring the distress frequently incident to the owners of unprofitable reversions, and of guarding against the improvidence with which men are commonly disposed to sacrifice the future to the present, especially when young, rash, and dissolute.[3]

§ 336. Indeed, in cases of this sort, Courts of Equity have extended a degree of protection to the parties,

[1] Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 157; Earl of Aldborough *v.* Frye, 7 Clark & Finnel. 436.

[2] Bowes *v.* Heaps, 3 Ves. & Beam. 117, 119; Peacock *v.* Evans, 16 Ves. 512.

[3] See Davis *v.* Duke of Marlborough, 2 Swanston, 147, 148, the Reporter's note; Twistleton *v.* Griffith, 1 P. Will. 310; Cole *v.* Gibbons, 1 P. Will. 293; Baugh *v.* Price, 1 Wils. R. 320; 2 Ves. 144, 155; Barnardiston *v.* Lingood, 2 Atk. 135, 136; Bowes *v.* Heaps, 3 Ves. & Beam. 117, 119, 120; Walmesly *v.* Booth, 2 Atk. 27, 28; 1 Madd. Ch. Pr. 97, 98, 99.

approaching to an incapacity to bind themselves absolutely by any contract, and, as it were, reducing them to the situation of infants, in order to guard them against the effects of their own conduct.[1] Hence it is, that, in all cases of this sort, it is incumbent upon the party dealing with the heir, or expectant, or reversioner, to establish, not merely, that there is no fraud; but, (as the phrase is) to make good the bargain; that is, to show that a fair and adequate consideration has been paid.[2] For, in cases of this sort, (contrary to the general rule,) mere inadequacy of price or compensation is sufficient to set aside the contract.[3] The relief is granted upon the general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception.[4] But it is not necessary, in cases of this sort, to establish in evidence that the full value of the reversionary interest or other expectancy has been given, according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase

[1] Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9; Peacock *v.* Evans, 16 Ves. 512, 514.

[2] Earl of Aldborough *v.* Frye, 7 Clark & Finnel. 436, 456. In this case Lord Cottenham said: "It appears to be established by several cases that where a party deals with an expectant heir, the *onus* is upon him to show that he gave a fair price."

[3] Peacock *v.* Evans, 16 Ves. 512, 514; Gowland *v.* De Faria, 17 Ves. 20; Bernal *v.* Donegal, 1 Bligh, (N. S.) 594; Hincksman *v.* Smith, 3 Russ. R. 433; Earl of Aldborough *v.* Frye, 7 Clark & Finnell. 436; Edwards *v.* Browne, 2 Collyer, R. 100.

[4] Walmesley *v.* Booth, 2 Atk. 28; 1 Madd. Ch. Pr. 97, 98; Sir John Strange, in Chesterfield *v.* Janssen, 2 Ves. 149; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9; Hincksman *v.* Smith, 3 Russ. R. 433; Ryle *v.* Brown and Swindell, 1 McClel. R. 519; S. C. 13 Price, R. 758; Earl of Aldborough *v.* Frye, 7 Clark & Finnel. 436, 456.

unimpeachable, if a fair price, or the fair market price, be given therefor, at the time of the dealing.[1]

§ 337. The doctrine applies, as we have seen, not merely to heirs dealing with their expectancies, but to reversioners and remainder-men, dealing with property already vested in them, but of which the enjoyment is future, and is, therefore, apt to be under-estimated by the giddy, the necessitous, the improvident, and the young.[2] According, however, to the decisions, age does not seem to make much difference as to the protection afforded to expectant heirs, since the aim of the rule is chiefly directed to prevent deceit and imposition upon parents and other ancestors.[3] And in regard to reversioners and remainder-men, if they are at the time necessitous, and laboring under pecuniary distress and embarrassment, an equally indulgent protection will also be afforded to them.[4]

§ 338. The ground of the interposition of Courts of Equity in cases of reversioners and remainder-men has been commented on by a late learned Judge, with great clearness. "At law, and in Equity also," (says he,) "generally speaking, a man, who has a power of disposition over his property, whether he sells to relieve

[1] Headin *v.* Rosher, McClel. & Younge, R. 89; Potts *v.* Curtis, 1 Younge, R. 543; Meriweather *v.* Herran, 8 B. Monroe, 162; Earl of Aldborough *v.* Frye, 7 Clark & Finnell. 436, 458 to 461.

[2] Gowland *v.* De Faria, 17 Ves. 20; Peacock *v.* Evans, 16 Ves. 512; Mr. Swanston's note, 2 Swanston, 147, 148; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*). But see Nichols *v.* Gould, 2 Ves. 422.

[3] Davis *v.* Duke of Marlborough, 2 Swanst. R. 151; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*k*); Ormond *v.* Fitzroy, 3 P. Will. 131; Wiseman *v.* Beake, 2 Vern. R. 121.

[4] Ibid.; Wood *v.* Abrey, 3 Madd. R. 418, 422; Chesterfield *v.* Janssen, 2 Ves. 157, 158; 1 Atk. 353; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9.

his necessities, or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price. A Court of Equity, however, will relieve expectant heirs and reversioners from disadvantageous bargains. In the earlier cases it was held necessary to show, that undue advantage was actually taken of the situation of such persons. But in more modern times it has been considered, not only that those who were dealing for their expectations, but those who were dealing for vested remainders also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose upon all who deal with expectant heirs and reversioners, the *onus* of proving that they had paid a fair price; and otherwise to undo their bargains, and compel a reconveyance of the property purchased.[1] The principle and the policy of the rule may both be equally questionable. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms. And persons, who sell their expectations and reversions from the pressure of distress, are thrown by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them. The principle of the rule cannot, however, be applied to sales of reversions by auction.[2] There

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[1] S. P. Bowtree *v.* Watson, 3 Mylne & Keen, 340; Newton *v.* Hunt, 5 Sim. R. 511.

[2] Sir John Leach, in Shelly *v.* Nash, 3 Madd. 232. And see Peacock *v.* Evans, 16 Ves. 514, 515; 1 Madd. Ch. Pr. 98, 99. — Mr. Swanston is of opinion, that, though the principle of the relief, afforded to reversioners, by its generality, seems to extend to every description of persons,

being no treaty between the vendor and the purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is in no sense in the power of the purchaser. The sale at auction is evidence of the market price." This language, however, correct as it may be in its application to the case before the Court, where the purchaser had no knowledge of the vendor or his circumstances, or even knew his name until after the purchase at public auction he applied for an abstract of the title, must not be interpreted to extend to all cases of sales at public auction; and especially where there had been a previous treaty in negotiation between the vendor and the purchaser or a private sale, and the embarrassment and distress, of the vendor is fully known, and the public auction is resorted to by the parties, either by design or by management, to cover up the transaction, or to disguise its true character from the public. To make the sale and

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dealing for or with a reversionary interest; yet it may be doubted, whether, in order to constitute a title to relief, the reversioner must not also combine the character of *Heir*. He has collected and compared the cases. Mr. Fonblanque manifestly does not contemplate any such limitation of the doctrine. He says: "The real object, which the rule proposes, being to restrain the anticipation of expectances, which must, from its very nature, furnish to designing men an opportunity to practise upon the inexperience or passion of a dissipated man, its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment, which might otherwise regulate their dealings." 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*k*). In Wood *v.* Abrey, 3 Madd. Rep. 423, the Vice-Chancellor said: "The policy of this rule as to reversions may be well doubted; and, if the cases were looked into, it might be found that the rule was *originally* referred only to expectant heirs, and not to reversioners." See also Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 398, 399; Hinksman *v.* Smith, 3 Russell, R. 433. See also Newton *v.* Hunt, 5 Sim. R. 511.

the purchase of the reversion valid, under any circumstances, it should clearly appear that the auction is free, fair, and with the ordinary precautions.[1] The reason is plain. Where the sale at public auction is free, fair, and with the ordinary precautions, the fair market price is presumed to be obtained. But if the sale at public auction be obtained under circumstances which establish clearly that the fair market value has not been obtained, and that reasonable precautions and advertisements have not been used for this purpose, and that the parties have connived in such a manner as to make the sale appear to be a public and a free sale, when it is in fact a mere cover of a private arrangement, then no such inference can arise in favor of the *bona fides* of the auction.[2]

§ 339. The whole doctrine of Courts of Equity, with respect to expectant heirs and reversioners, and others in a like predicament, assumes that the one party is defenceless, and is exposed to the demands of the other under the pressure of necessity. It assumes, also, that there is a direct or implied fraud upon the parent or other ancestor, who, from ignorance of the transaction, is misled into a false confidence in the disposition of his property. Hence it should seem, that one material qualification of the doctrine is, the existence of such ignorance. If, therefore, the transaction has been fully made known at the time to the parent, or other person, standing *in loco parentis;* as, for example, to the person from whom the *spes successionis* is entertained, or after the expiration of whose present estate the reversionary

[1] Ibid.; Post, § 347; Earl of Aldborough *v.* Frye, 7 Clark & Finnel. 436, 456, 460, 461, 466.

[2] Ibid.

interest is to become vested in possession, and it is not objected to by him, the extraordinary protection, generally afforded in cases of this sort by Courts of Equity, will be withdrawn. *A fortiori*, it will be withdrawn, if the transaction is expressly sanctioned or adopted by such parent, or other person, standing *in loco parentis*.[1] And it has been strongly said, that it

[1] King v. Hamlet, 4 Sim. R. 182; S. C. 2 Mylne & Keen, 473, 474. The judgment of Lord Brougham, in this case, on this point, is very able, and deserves a thorough examination. His Lordship, on this occasion, said: "Two propositions I take to be incontestable, as applicable to the doctrines of this Court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question. First, that the extraordinary protection, given in the general case, must be withdrawn, if it shall appear that the transaction was known to the father, or other person standing *in loco parentis*, — the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, — even although such parent or other person took no active part in the negotiation; provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that, if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it, so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be, if the father, or person *in loco parentis*, shall be found to have concurred in this adoption of the repudiated contract. Either of these propositions would be decisive of the present question, if they are well founded in law, and if the facts allow of their application to it. I shall examine each of them in both respects. The whole doctrine with respect to an expectant heir, assumes that the one party is defenceless, and exposed, unprotected to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age, as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by, and suffer his son to obtain the assistance which he ought himself to have rendered; and then only stand forward to aid him in rescinding engagements which he had allowed him to make and to profit by. If all the cases be examined from the time of Lord Nottingham downwards, no trace will be found in any one of them

would be monstrous to treat the contracts of a person of mature age, as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by, and suffer his son to obtain the assistance, which he ought himself to have rendered; and then only stand forward to aid him in rescinding engagements, which he had allowed him to make, and to profit by.[1]

§ 340. The other qualification of the doctrine is not less important. The contract must be made under the pressure of some necessity; for the main ground of the doctrine is, the pressure upon the heir, or the distress of the party, dealing with his expectancies, who is, therefore, under strong temptations to make undue sacrifices of his future interests.[2] Both of these qualifications need not, indeed, in all cases and under all

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of the father's or other ancestor's privity. On the contrary, wherever the subject is touched upon, his ignorance is always assumed as part of the case; and its being so seldom mentioned either way, shows clearly that the privity of the father or ancestor never was contemplated. It is, however, several times adverted to in a manner demonstrative of the principle. In Cole v. Gibbons, (3 P. Wms. 290,) the ground of this whole equity is said to be the policy of the law, to prevent the heir being seduced from a dependence upon the ancestor, who probably would have relieved him. In the same spirit, Lord Cowper, in Twistleton v. Griffith, (1 P. Wms. 310,) had before stated, as one effect of the law, its tendency, by cutting off relief at the hands of strangers, to make the heir disclose his difficulties at home. So, in The Earl of Chesterfield v. Janssen (1 Atk. 339,) Mr. Justice Burnett treats such transactions, as things done behind the father's back, and, as it were, a fraud upon him; a view of the subject also adopted by Lord Hardwicke, in the same case (1 Atk. 333, 334.) It is as well to mention these cases, because there has been no decision upon the point; but it is quite a clear one, and only new, because the facts never afforded a case for decision, the proposition having apparently never been questioned."

[1] King v. Hamlet, 2 Mylne & Keen, 473, 474; S. C. 4 Sim. R. 185.

[2] King v. Hamlet, 4 Sim. R. 182; S. C. 2 Mylne & Keen, 473, 474.

circumstances, concur to justify relief. It may be sufficient, that either of them forms so essential an ingredient in the case, as to give rise to a just presumption of constructive fraud.[1]

*§ 341. The doctrine of Courts of Equity upon this subject, if it has not been directly borrowed from, does in no small degree follow out the policy of, the Roman Law in regard to heirs and expectants. By the Macedonian Decree, (so called from the name of the usurer who gave occasion to it,) all obligations of sons, contracted by the loan of money, while they were living in subjection to the paternal authority and jurisdiction, were declared null without distinction. And they were

[1] Earl of Portmore *v.* Taylor, 4 Sim. R. 182: Davis *v.* Duke of Marlborough, 2 Swanst. 139, 154. See also King *v.* Hamlet, 2 Mylne & Keen, 473, 474, 480. Lord Brougham, on this occasion, addressing himself to this point, said: "The whole ground of the doctrine is the pressure upon the heir, or the distress of the party dealing with his expectancies. While he continues under that pressure, the law (as Lord Thurlow said in Gwynne *v.* Heaton, 1 Bro. C. C. 1,) treats him as an infant. But the infancy is determined, when the pressure is removed. The protection, which Sir William Grant well describes, in Peacock *v.* Evans (16 Ves. 512,) as approaching nearly to incapacity of contracting, must cease, when the exigency of the case is at an end. When the expectant heir has himself thrown off the trammels, which necessity had imposed on him, or rather had induced him to fetter himself withal, and has placed himself in an adverse attitude towards the other party, of whom he had become really independent, he must no longer be treated differently from other persons. From the rule, to which all are subject, he cannot be exempt, the rule which forbids a party to repudiate a dealing of which he voluntarily and freely is availing himself. Least of all shall he be permitted to use, for his own benefit, or, which is the same thing, to make away with, or in any manner place out of his reach, for his present benefit, the property of another; and then to repudiate the contract, by which that property came into his possession. To hold that he was entitled to do this, after the pressure of his circumstances had been removed, and merely because he owed the possession originally to the pressure of former difficulties, would be an extravagant stretch of the doctrines of this Court."

not allowed to be valid even after the death of the father; not so much out of favor to the son, as out of odium to the creditor, who had made an unlawful loan, which was vicious in its origin, as well as in its example. *Verba Senatusconsulti Macedoniani hæc sunt, &c. Placere, ne cui, qui filiofamilias mutuam pecuniam dedisset, etiam post mortem parentis ejus, cujus in potestate fuisset, actio petitioque daretur; ut scirent, qui pessimo exemplo fœnarent, nullius posse filiifamilias bonum nomen, expectata patris, morte, fieri.*[1] Upon this decree Lord Hardwicke has remarked, that the Senate and law-makers in Rome, were not so weak as not to know that a law to restrain prodigality, to prevent a son's running in debt in the life of his father, would be vain in many cases. Yet they made laws to this purpose, namely, the Macedonian Decree already mentioned, happy if they could in some degree prevent it; *Est aliquod prodire tenus.*[2]

§ 342. It is upon similar principles, that *post obit* bonds, and other securities of a like nature, are set aside, when made by heirs and expectants. A *post obit* bond is an agreement, on the receipt of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, upon the death of the person, from whom he (the obligor) has some expectations, if he should survive him.[3] Such bonds operate as a virtual fraud upon the bounty of the ancestor, and disappoint his intentions, generally by design, and usually in the event.

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[1] Dig. Lib. 14, tit. 6, l. 1; 1 Domat, Civil Law, B. 1, tit. 6, § 4, and art. 1, 2; 1 Fonbl. Eq. B. 1, ch. 2, § 12, note (*l*).

[2] Chesterfield *v.* Janssen, 2 Ves. 158.

[3] Boynton *v.* Hubbard, 7 Mass. R. 119; Chesterfield *v.* Janssen, 2 Ves. 157; 1 Atk. R. 352; Fox *v.* Wright, 6 Madd. R. 111; Wharton *v.* May, 5 Ves. 27; Cushing *v.* Townsend, 19 Ves. 628; Earl of Aldborough *v.* Frye, 7 Clark & Finnel. 436.

§ 343. A case of a very similar character is a contract, by which an expectant heir, upon the present receipt of a sum of money, promises to pay over to the lender a large, though an uncertain proportion of the property which might descend to him upon the death of his parent or other ancestor, if he should survive him. It is a fraud upon such parent or other ancestor, and introductive of the worst public mischiefs; for the parent or ancestor is thereby induced to submit in ignorance to the disposition which the law makes of his estate, upon the supposition that it will go to his heir, when in fact a stranger is, against his will, made the substituted heir.[1] It might be very different, if there was a fair, although a secret agreement between all the heirs to share the estate equally; for such an agreement would have a tendency to suppress all attempts of one or more to overreach the others, as well as to prevent all exertions of undue influence.[2]

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[1] Boynton *v.* Hubbard, 7 Mass. R. 112.

[2] Beckley *v.* Newland, 2 P. Wms. 182; Wethered *v.* Wethered, 2 Sim. R. 183; Harwood *v.* Tooke, 2 Sim. R. 192; Hyde *v.* White, 5 Sim. R. 524. — Mr. Chief Justice Parsons, in Boynton *v.* Hubbard, (7 Mass. R. 112,) expounded this whole subject with admirable fulness and force; and held, that even at law such securities could be relieved against. I gladly extract the following passage from his opinion. "Another case is, where the deceit is upon persons not parties to the contract, as a deceit on a father or other relation, to whom the affairs of an heir or expectant are not disclosed; so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form. This deceit is relieved against as a public mischief, destructive of a well-regulated authority or control of persons over their children, or others, having expectations from them, and as encouraging extravagance, prodigality, and vice. From the forms of proceeding in Courts of Equity, it must be admitted, that these principles may often be more correctly applied there than in Courts of Law. Chancery may compel a discovery of facts, which a Court of Law cannot, and from facts disclosed, a Chancellor, as a judge of facts, may infer other facts, whence deceit, public or private, may be irresistibly presumed. Whereas,

§ 344. From what has been already said, it follows, as a natural inference, that contracts of this sort are

at law, fraud cannot be presumed, but must be admitted or proved to a jury. But, when a Court of Law has regularly the fact of fraud admitted or proved, no good reason can be assigned why relief should not be obtained there, although not always in the same way in which it may be obtained in Equity. A case, in which an heir or expectant is frequently relieved against his own contract, is a *post obit* bond. This is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity; but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor, to induce him to make this contract, he is relieved, as against an unconscionable bargain, on payment of the principal and interest. This contract may be made on data, whence its reasonableness may be ascertained for the lives of the obligor, and of the person on whose death the payment is to be made, are subject to be valued, as is done in insurances upon lives. But the covenant declared on in the case at bar is not in the nature of a *post obit* contract. Another case in which an heir is relieved, is, when he is entitled to an estate in reversion or remainder, expectant on the death of some ancestor or relative, and he contracts to sell the same for present money. All these cases are not relieved against as fraudulent; because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But, as in *post obit* contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against the sale, on repaying the principal and interest, and sometimes paying for reasonable repairs made by the purchaser. This relief is granted on the ground that the contract of sale was unconscionable. In unconscionable *post obit* contracts, Courts of Law may, when they appear in a suit commenced upon them, to have been against conscience, give relief, by directing a recovery of so much money only as shall be equal to the principal received and the interest. But, in sales of remainders and reversions, by grants executed, I know of no relief that Courts of Law can give, unless the grants shall appear to have been fraudulently obtained of the grantor; in which case the fraud will vitiate and render null the grants so infected. The contract before us is not a sale of a remainder or reversion; but is different from any noticed in the Reports, that have been cited. There is one case of a contract between presumptive heirs, respecting their expectancies from the same ancestor. It is the case of Beckley *v.* Newland. The parties had married two sisters, presumptive heirs of Mr. Turgis.

not in all cases utterly void; but they are subject to all real and just equities between the parties, so that

The husbands agreed that whatever should be given by Mr. Turgis, should be equally divided between them. After Mr. Turgis's death, the defendant, who had the greater part given to him, was compelled to execute the agreement. The reciprocal benefit of the chance was a sufficient consideration. The tendency of the agreement was to guard against undue influence over the testator; and it could not be unreasonable to covenant to do what the law would have done, if Turgis had died intestate. The covenant declared on in the case at bar is an agreement by an heir, having two ancestors, then living, an uncle and an aunt, that, if he survive them, or either of them, he will convey to a stranger one third part of all the estate, real and personal, which shall come to him from those ancestors, or either of them, by descent, distribution, or devise. And it is found by the jury, that this contract was not obtained from the heir by the fraud of the purchaser. If, therefore, this covenant is void, it must be on the principle that it is a fraud, not on either of the parties, for that the jury have negatived, but on third persons not parties to it, productive of public mischief, and against sound public policy. If the contract had this effect, it is apparent to the Court from the record; the whole contract being a part of the record. And that a contract of this nature had this effect, we cannot doubt. The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him, as a co-heir with himself to his uncle's estate. The uncle is thus made to leave a portion of his estate to Boynton, a stranger, without his knowledge, and, consequently, without any such intention. This Lord Hardwicke calls a deceit on the ancestor. And what is the consequence of deceits of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them, than what arises from a fear of his displeasure, from which fear the heirs may be induced to live industriously, virtuously, and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness, and vice; and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens." [In a subsequent case in the same court, where Boynton v. Hubbard was cited and approved, it was determined that an heir expectant might lawfully covenant, with the consent of his ancestor, to

there shall be no inadequacy of price, and no inequality of advantages in the bargain. If in other respects these contracts are perfectly fair, Courts of Equity will permit them to have effect, as securities for the sum, to which *ex æquo et bono* the lender is entitled; for he, who seeks Equity, must do Equity; and, therefore, relief will not be granted upon such securities, except upon equitable terms.[1]

§ 345. And where, after the contemplated events have occurred, and the pressure of necessity has been removed, the party freely and deliberately, and upon full information, confirms the precedent contract, or other transaction, Courts of Equity will generally hold him bound thereby; for, if a man is fully informed, and acts with his eyes open, he may, by a new agreement, bar himself from relief.[2] But, if the party is still acting under the pressure of the original transaction, or the original necessity; or, if he is still under the influence of the original transaction, and of the

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convey the estate, which should come to him by descent or otherwise from such ancestor, a fair consideration being paid. Fitch *v.* Fitch, 8 Pick. 480. And see Trull *v.* Eastman, 3 Metc. 123]

[1] Boynton *v.* Hubbard, 7 Mass. R. 112, 120; Curling *v.* Townshend, 19 Ves. 628; Bernal *v.* Donegal, 3 Dow, R. 133; S. C. 1 Bligh, Rep. (N. S.) 591; Wharton *v.* May, 5 Ves. 27; 1 Fonbl. Eq. B. 1, ch. 2, § 13, and note (*p*); Evans *v.* Cheshire, Belt's Supplement, 300; Crowe *v.* Ballard, 3 Bro. Ch. R. 120; Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, 9, 10; Davis *v.* Duke of Marlborough, 2 Swanst. 174; Earl of Aldborough *v.* Frye, 6 Clark & Fin. 436, 462, 464.

[2] Chesterfield *v.* Janssen, 2 Ves. 125; 1 Atk. R. 354; Crowe *v.* Ballard, 3 Bro. Ch. R. 150; Coles *v.* Gibbon, 3 P. Will. 293, 294; Cole *v.* Gibson, 1 Ves. 503, 506, 507; Cann *v.* Cann, 1 P. Will. 723.—Mr. Fonblanque has remarked, that Lord Hardwicke, in Chesterfield *v.* Janssen, (2 Ves. 125; 1 Atk. 351,) has brought together, and classed, all the cases upon the subject of confirmation; and the result seems to be, that, if the original contract be illegal or usurious, no subsequent agreement or

delusive opinion that it is valid and binding upon him; then, and under such circumstances, Courts of Equity will hold him not barred from relief by any such confirmation.[1]

confirmation of the party can give it validity. But, if it be merely against conscience, then, if the party, being fully informed of all the circumstances of it, and of the objections to it, voluntarily comes to a new agreement, he thereby bars himself of that relief, which he might otherwise have had in Equity. Not so, if the confirmation be a continuance of the original fraud or imposition. 1 Fonbl. Eq. B. 1, ch. 2, § 13, note (*r*). See also Id. § 14, note (*t*). Whether this statement will be found fully borne out by the authorities, is, perhaps, not beyond doubt. Where a contract is utterly void, as from illegality, or as being contrary to good morals, or as contrary to public policy, there seems the strongest reason to say, that it cannot acquire any validity, from any confirmation; for the original taint attaches to it through every change. To give it efficacy would contradict two well established maxims of the Common Law. Quod contra legem fit, pro infecto habetur. Quod ab initio non valet, in tractu temporis non convalescet; et quæ malo sunt inchoata principio, vix est, ut bono peragantur exitu. 4 Co. R. 2; Id. 31; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*y*). But, where the contract is merely voidable, it seems, upon general principles, capable of confirmation. The difficulty is, not so much in stating that it is capable of confirmation, but under what circumstances the confirmation ought to be held conclusive. The remarks of Lord Hardwicke, in Chesterfield *v.* Janssen, 2 Ves. 158, 159, 1 Atk. R. 354; and Cole *v.* Gibson, 1 Ves. R. 506, 507, compared with those of Lord Thurlow, in Crowe *v.* Ballard, 3 Bro. Ch. R. 120, S. C. 1 Ves. 219, 220; S. C. 2 Cox, R. 257, and of Lord Eldon, in Wood *v.* Downes, 18 Ves 123, 121, 128; and of Lord Erskine, in Morse *v.* Royal, 12 Ves. 373, 371, have not wholly relieved the doctrine from difficulty. In Cole *v.* Gibson, 1 Ves. 503, 506, 507, Lord Hardwicke seemed to hold a marriage brokage bond capable of confirmation, though held void upon public policy. But in Shirley *v.* Martin, in 1779, the Court of Exchequer held, that contracts, avoided on account of public inconvenience, would not admit of subsequent confirmation by the party; and, therefore, that a marriage brokage bond was incapable of confirmation. Cited 1 Fonbl. Eq. B. 1, ch. 2, § 14, note (*u*); Id. ch. 4, § 10, note (*s*); S. C. cited 1 Ball & B. 357, 358; 3 P. W. 75, Cox's note. See also Say *v.* Barwick, 1 Ves. & B. 195. See Gwynne *v.* Heaton, 1 Bro. Ch. R. 1, and Mr. Belt's note (l), ibid. See also Ante, § 293, and Newland on Contracts, ch. 25, p. 496 to 503.

[1] Wood *v.* Downes, 18 Ves. 123, 121, 128; Crowe *v.* Ballard, 3 Bro.

§ 346. Similar principles will govern in cases, where the heir or other expectant is relieved from his necessities, and becomes opposed to the person with whom he has been dealing, and seeks to repudiate the bargain. In such cases he must not do any act, by which the rights or property of the other party will be injuriously affected, after he is thus deemed to be restored to his general capacity. If he does, he becomes affected with the ordinary rule, which governs in other cases, and forbids a party to repudiate a dealing, and at the same time to avail himself fully of all the rights and powers, resulting therefrom, as if it were completely valid.[1]

§ 347. Even the sale of a *post obit* bond at public auction will not necessarily give it validity, or free it from the imputation of being obtained under the pressure of necessity. For the circumstances may be such as to establish, that the expectant is acting without any of the usual precautions to obtain a fair price; and is in great distress for money; and is really in the hands and under the control of those who choose to become bidders for the purpose of fleecing him.[2] The case is not like the case of an ordinary sale of a reversion at public auction, where the usual precautions are taken; for there it may be perfectly proper not to

Ch. R. 120; S. C. 1 Ves. 214, 219, 220; S. C. 2 Cox, R. 253, 257; Taylor *v.* Rochfort, 2 Ves. 281; Murray *v.* Palmer, 2 Sch. & Lefr. 486; Roche *v.* O'Brien, 1 B. & Beatt. R. 338, 339, 340, 353, 354, 356; Morse *v.* Royal, 12 Ves. 373, 374; Gowland *v.* De Faria, 17 Ves. 20; Dunbar *v.* Tredennick, 2 Ball & B. 316, 317, 318.

[1] King *v.* Hamlet, 2 Mylne & Keen, R. 474, 480. See also Gwynne *v.* Heaton, 1 Bro. Ch. R. 1; Peacock *v.* Evans, 16 Ves. 512; Ante, § 339, 340.

[2] Fox *v.* Wright, 6 Madd. R. 77; Earl of Aldborough *v.* Frye, 7 Clark & Fin. 436.

require the purchaser to show that he has given the full value.[1] Where the sale is public, and free and fair, it may be justly presumed, that the fair market price is obtained, and there seems no reason to call in question its general validity; but it should be specially impeached. In sales of reversions at public auction, there is not usually any opportunity, as there is upon a private treaty, for fraud and imposition upon the seller. The latter is in no just sense in the power of the purchaser. The sale by public auction is, under ordinary circumstances, evidence of the market price.[2] But the sale of *post obit* bonds at auction carries with it, generally, a presumption of distress and pecuniary embarrassment; and if the ordinary precautions are thrown aside, there is a violent presumption of extravagant rashness, imprudence, or circumvention.

§ 348. Contracts of a nature nearly resembling *post obit* bonds, have, in cases of young and expectant heirs, been often relieved against, upon similar principles. Thus, where tradesmen and others have sold goods to such persons at extravagant prices, and under circumstances demonstrating imposition, or undue advantage, or an intention to connive at secret extravagance, and profuse expenditures, unknown to their parents, or other ancestors, Courts of Equity have reduced the securities, and cut down the claims to their reasonable and just amount.[3]

[1] Earl of Aldborough *v.* Frye, 7 Clark & Fin. 436; Ante. § 338.

[2] Shelby *v.* Nash, 3 Madd. R. 125; Fox *v.* Wright, 6 Madd. R. 77; Earl of Aldborough *v.* Frye, 7 Clark & Fin. 436, 456 to 461.

[3] Bill *v.* Price, 1 Vern. R. 467, and Mr. Raithby's note (1); Ibid. 1 Eq. Abr. 91, G. pl. 8; Lamplugh *v.* Smith, 2 Vern. 77; Witley *v.* Price, 2 Vern. R. 78; Brook *v.* Gally, 1 Atk. 34, 35, 36; Berkley *v.* Bishop, 1 Atk. R. 39; Gilbert, Lex Prætor, 291. But see Barney *v.* Beak, 2 Ch. Cas. 136; Gwynne *v.* Heaton, 1 Bro. Ch. R. 9, 10.

§ 349. Another class of constructive frauds upon the rights, interests, or duties of third persons, embraces all those agreements and other acts of parties, which operate directly or virtually to delay, defraud, or deceive creditors. Of course we do not here speak of cases of express and intentional fraud upon creditors, but of such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interest. It is difficult, in many cases of this sort, to separate the ingredients, which belong to positive and intentional fraud, from those of a mere constructive nature, which the law pronounces fraudulent upon principles of public policy. Indeed, they are often found mixed up in the same transaction; and any attempt to distinguish between them, or to weigh them separately, would be a task of little utility, and might, perhaps, mislead and perplex the inquiries of students.

§ 350. It must be a fundamental policy of all enlightened nations to protect and subserve the rights of creditors; and a great anxiety to afford full relief against frauds upon them has been manifested, not only in the Civil Law, but from a very early period, in the Common Law also. In the Civil Law it was declared, that whatever was done by debtors to defeat their creditors, whether by alienation, or by other disposition of their property, should be revoked, or null, as the case might require. *Ait Prætor; Quæ fraudationis causâ gesta erunt, cum eo, qui fraudem non ignoraverit; de his curatori bonorum, vel ei, cui de ea re actionem dare oportebit, intra annum, quo experiundi potestas fuerit, actionem dabo. Idque etiam adversus ipsum, qui fraudem fecit, servabo. Necessario Prætor hoc edictum proposuit; quo edicto consuluit creditoribus,*

revocando ea, quæcunque in fraudem eorum alienata sunt.[1] *Ait ergo Prætor; Quæ fraudationis causâ gesta erunt. Hæc verba generalia sunt, et continent in se omnem omnino in fraudem factam, vel alienationem vel quemcunque contractum. Quodcunque igitur fraudis causâ factum est, videtur his verbis revocari, qualecunque fuerit. Nam, latè ista verba patent. Sive ergo rem alienavit, sive acceptilatione vel pacto aliquem liberavit.*[2] *Idem erit probandum. Et si pignora liberet, vel quem alium in fraudem creditorum præponat.*[3] And the rule was not only applied to alienations, but to fraudulent debts, and, indeed, to every species of transaction or omission, prejudicial to creditors. *Vel ei præbuit exceptionem, sive se obligavit fraudandorum creditorum causa, sive numeravit pecuniam, vel quodcunque aliud fecit in fraudem creditorum; palam est, edictum locum habere, &c. Et qui aliquid fecit, ut desinat habere, quod habet, ad hoc edictum pertinet. In fraudem facere videri etiam eum, qui non facit, quod debet facere, intelligendum est; id est, si non utitur servilibus.*

§ 351. Hence, all voluntary dispositions, made by debtors, upon the score of liberality, were revocable, whether the donee knew of the prejudice intended to the creditors or not. *Simili modo dicimus, et si cui donatum est, non esse quærendum, an sciente eo, cui donatum gestum sit; sed hoc tantum, an fraudentur creditores.*[5] And the like rule was applied to purchasers, even for a valuable consideration, if they knew the

[1] Dig. Lib. 42, tit. 8, l. 1, § 1.

[2] Dig. Lib. 42, tit. 8, l. 1, § 2; Pothier, Pand. Lib. 44, tit. 8, n. 2.

[3] Id. l. 2; 1 Domat, B. 2, tit. 10, art. 7.

[4] Dig. Lib. 42, tit. 8, l. 3, § 1, 2; Id. l. 4; Pothier, Pand. Lib. 42, tit. 8, n. 1 to 36; 1 Domat, B. 2, tit. 10, art. 1, pr. tot.; Id. art. 8.

[5] Dig. Lib. 42, tit. 8, l. 6, § 11; 1 Domat, B. 2, tit. 10, art. 2.

fraudulent intention at the time of their purchases, and thus became partakers of it, that they might profit by it.[1] *Quæ fraudationis causâ gesta erunt, cum eo, qui fraudem non ignoraverit, de his, &c., actionem dabo. Si debitor in fraudem creditorum minore pretio fundum scienti emptori vendiderit; deinde hi, quibus de revocando eo actio datur, cum petant; quæsitum est, an prætium restituere debent? Proculus existimat, omnimodi restituendum esse fundum, etiamsi pretium non solvatur; et rescriptum est secundum Proculi sententiam.*[2]

§ 352. The Common Law adopted similar principles at an early period. These principles, however, have been more fully carried into effect by the statutes of 50 Edward III., ch. 6, and 3 Henry VII., ch. 4, against fraudulent gifts of goods and chattels; by the statute of 13 Elizabeth, ch. 5, against fraudulent conveyances of lands to defeat or delay creditors; and by the statute of 27 Elizabeth, ch. 4, against fraudulent or voluntary conveyances of lands, to defeat subsequent purchasers. These statutes have always received a favorable and liberal interpretation in all the Courts, both of Law and Equity, in suppression of fraud.[3] Indeed, the principles and rules of the Common Law, as now universally known and understood, are so strong against fraud, in every shape, that Lord Mansfield has remarked, that the Common Law would have attained every end proposed by these statutes.[4] This

[1] Dig. Lib. 42, tit. 8, l. 1; Pothier, Pand. Lib. 42, tit. 8, n. 1.

[2] Dig. Lib. 42, tit. 8, l. 1; Id. l. 7; 1 Domat, B. 2, tit. 10, art. 4.

[3] Cadogan *v.* Kennett, Cowp. R. 139; Jeremy on Eq. Jurisd. B. 3, P. 2, ch. 3, § 4, p. 410, 411, 412; Newland on Contracts, ch. 23, p. 370, 371; Com. Dig. *Covin*, B. 2, 3.

[4] Ibid.; Hamilton *v.* Russell, 1 Cranch, 309; Com. Dig. *Covin*, B. 2. — The statutes of 50 Edward III., ch. 6, and 3 Henry VII., ch. 4,

is, perhaps, stating the matter somewhat too broadly, at least in regard to the statute of 27 Eliz. ch. 4, as it is now construed; for the latter, in favor of subsequent purchasers, applies to cases of voluntary conveyances, whether they are fraudulent or not.[1] Courts of Equity, from the enlarged principles upon which they act, to protect the rights and interests of creditors, give full effect to all the provisions, and exert their jurisdiction

expressly declare all gifts, &c., of goods and chattels, intended to defraud creditors, to be null and void. 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*c*); Com. Dig. *Covin*, B. 2. In Hamilton *v.* Russell, (1 Cranch, R. 309,) the Supreme Court of the United States said, that the statute of 13 Eliz. and 27 Eliz., are considered as only declaratory of the principles of the Common Law. See 1 Fonbl. Eq. B. 1, ch. 4, § 13, and note (*d*); Co. Litt. 290, *b*.

[1] See Buckle *v.* Mitchell, 18 Ves. 110; Doe *v.* Manning, 9 East, R. 59; Townshend *v.* Windham, 2 Ves. 10, 11; Walker *v.* Burroughs, 1 Atk. 93, 94; Cathcart *v.* Robinson, 5 Peters, R. 264. — There is a distinction made in England between the statute of 13 Eliz. ch. 5, and the statute of 27 Eliz. ch. 4, which should be here borne in mind, though it will naturally come under consideration in a subsequent page. All voluntary conveyances are not void against creditors, equally the same as they are against subsequent creditors. It is necessary on the statute of 13 Eliz. to prove, that the party was indebted at the time, or immediately after the execution of the deed, or otherwise it would be attended with bad consequences, because the statute extends to *goods* and chattels; and such construction would defeat every provision for children and families, though the father was not indebted at the time. Walker *v.* Burroughs, 1 Atk. 93; Battersbee *v.* Farringdon, 1 Swanst. R. 106, 113. But upon the statute of 27 Eliz. ch. 4, subsequent purchasers for a valuable consideration may set aside the former voluntary conveyance, though *bonâ fide* made, even though such purchasers had full notice of such voluntary conveyance. Doe *v.* Routledge, Cowp. R. 711, 712; Gooch's case, 5 Co. R. 60, 61; Twyne's case, 3 Co. R. 83; Doe *v.* Manning, 9 East, R. 59; Buckle *v.* Mitchell, 18 Ves. 110; Holloway *v.* Millard, 1 Madd. R. 227, 228, 229; Cotterell *v.* Howe, 13 Simons, R. 506. The statute of 27 Eliz. ch. 4, does not apply to goods and chattels but to lands and other real estate only. Jones *v.* Croucher, 1 Sim. & Stu. 315; Atherley on Mar. Sett. ch. 13, p. 207; Post, § 355 to 365, and § 425 to 431.

upon the same construction of these statutes, which is adopted by Courts of Law.[1] They even go further; and (as we shall presently see) extend their aid to many cases not reached by these statutes.

§ 353. And, in the first place, let us consider the nature and operation of the statute of 13 Elizabeth, ch. 5, as to creditors, which has been universally adopted in America, as the basis of our jurisprudence on the same subject. The object of the Legislature evidently was, to protect creditors from those frauds which are frequently practised by debtors, under the pretence of discharging a moral obligation, that is, under the pretence of making suitable provisions for wives, children, and other relations. Independently of the statute, no one can reasonably doubt that a gift or conveyance, which has neither a good nor a meritorious consideration to support it, ought not to be valid against creditors; for every man is bound to be just, before he is generous;[2] and the very fact that he makes a voluntary gift or conveyance to mere strangers to the prejudice of his creditors, affords a conclusive ground, that it is fraudulent. The statute, while it seems to protect the legal rights of creditors against the frauds of their debtors, anxiously excepts from such imputation the *bona fide* discharge of moral duties. It does not, therefore, declare all voluntary conveyances to be void; but only all fraudulent conveyances to be void.[3] And, whether a conveyance be

[1] Ibid.

[2] Copis *v.* Middleton, 2 Madd. R. 428; Partridge *v.* Gopp, 1 Eden, R. 166, 167, 168; S. C. Ambler, R. 598, 599.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 12, (*a*); Doe *v.* Routledge, Cowp. R. 708; Cadogan *v.* Kennett, Cowp. R. 432, 434; Holloway *v.* Millard, 1 Madd. R. 227; Sagitary *v.* Hide, 2 Vern. 44. — Many of the succeeding re-

fraudulent or not is declared to depend upon its being made "upon good consideration and *bona fide*."[1] It is not sufficient that it be upon good consideration or *bona fide*. It must be both. And, therefore, if a conveyance or gift be defective in either particular, although it is valid between the parties and their representatives, yet it is utterly void as to creditors.

§ 354. This leads us to the inquiry, what are deemed good considerations in the contemplation of the statute. A good consideration is sometimes used in the sense of a consideration, which is valid in point of law; and then it includes a meritorious, as well as a valuable consideration.[2] But it is more frequently used in a sense contradistinguished from valuable; and then it imports a consideration of blood, or natural affection, as when a man grants an estate to a near relation, merely founded upon motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems as an equivalent given for the grant, and it is, therefore,

marks upon this subject I have taken, almost literally, from Mr. Fonblanque's very able notes; and I desire this general acknowledgment to be taken, as an expression of my very great obligations to him in every part of my work. 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (*a*). The word "voluntary" is not to be found either in the statute of 13 Elizabeth, ch. 5, or of the statute of 27 Elizabeth, ch. 4. Holloway *v.* Millard, 1 Madd. R. 227, 228. A voluntary conveyance to a stranger, made *bonâ fide* by a party not indebted at the time, would be good against subsequent creditors. Holloway *v.* Millard, 1 Madd. R. 227, 228; Walker *v.* Burroughs, 1 Atk. 93.

[1] Ibid.; Bacon, Abridg. *Fraud*, C.

[2] Hodgson *v.* Butts, 3 Cranch, 140; Copis *v.* Middleton, 2 Mad. R. 430; Twyne's case, 3 Co. R. 81; Taylor *v.* Jones, 2 Atk. 601; Newland on Contracts, ch. 23, p. 386; Partridge *v.* Gopp, Ambler, R. 598, 599; S. C. 1 Eden, R. 167, 168; Atherly on Mar. Sett. ch. 13, pp. 191, 192.

founded upon motives of justice.[1] Deeds, made upon a good consideration only, are considered as merely voluntary; those made upon a valuable consideration are treated as compensatory. The words, "good consideration," in the statute, may be properly construed to include both descriptions; for it cannot be doubted, that it meant to protect conveyances, made *bonâ fide*, and for a valuable consideration, as well as those made *bona fide*, upon the consideration of blood or affection.[2]

§ 355 In regard to voluntary conveyances, they are unquestionably protected by the statute in all cases, where they do not break in upon the legal rights of creditors. But when they break in upon such rights, and so far as they have that effect, they are not permitted to avail against those rights. If a man, therefore, who is indebted, conveys property to his wife or children, such a conveyance is, or at least, may be within the statute, for, although the consideration is good, as between the parties, yet, it is not in contemplation of law, *bona fide*; for it is inconsistent with the good faith which a debtor owes to his creditors, to withdraw his property voluntarily from the satisfaction of their claims,[3] and no man has a right to prefer the

[1] 2 Black Com 297: 1 Fonbl. Eq B 1, ch 4, § 12, note (*a*)

[2] Doe *v* Routledge, Cowp R 708, 710, 711, 712, Copis *v* Middleton, 2 Mad R 430, Hodgson *v* Butts, 3 Cranch, R 140, Twyne's Case, 3 Co R 81

[3] 1 Fonbl Eq B 1, ch 4, § 12, note (*a*), Twyne's case, 3 Co R 81, Townshend *v* Windham, 2 Ves 10, 11, Doe *v* Routledge, Cowp R 711, Russell *v* Hammond, 1 Atk 15, 16, Tynham *v* Mullens, 1 Madd. R 11) Holloway *v* Millard, 1 Madd R 227 228, Bayard *v* Hoffman, 4 Johns Ch R 450, Reade *v* Livingston, 3 Johns Ch R 181, Taylor *v* Jones 2 Atk 600, 601, Townshend *v* Windham, 2 Ves 10, Copis *v* Middleton, 2 Madd R 425 See Seward *v* Jackson, 5 Cowen, R 406, Wickes *v* Clarke, 8 Paige, R 160, 165

claims of affection to those of justice. This doctrine, however, (as we shall presently see,) requires, or at least may admit of, some qualification in relation to existing creditors, where the circumstances of the indebtment and the conveyance repel any possible imputation of fraud, as where the conveyance is of a small property by a person of great wealth, and his debts bear a very small proportion to his actual means.

§ 356. But, at all events, the same doctrine does not apply to a man not indebted at the time, or in favor of subsequent creditors. There is nothing inequitable or unjust in a man's making a voluntary conveyance or gift, either to a wife or to a child, or even to a stranger, if it is not, at the time, prejudicial to the rights of any other persons, or in furtherance of any meditated design of future fraud or injury to other persons.[1] If, indeed, there is any design of fraud, or collusion, or intent to deceive third persons, in such conveyances, although the party be not then indebted, the conveyance will be held utterly void, as to subsequent as well as to present creditors, for it is not *bonâ fide*.[2]

[1] 1 Fonbl. Eq. B. 1 ch. 4, § 12, note (*a*); Townshend *v.* Windham, 2 Ves. 11; Walker *v.* Burroughs, 1 Atk. 93; Bac. Abridg. *Fraud*, C.; Doe *v.* Routledge, Cowp. R. 710, 711; Russell *v.* Hammond, 1 Atk. 15, 16; Holloway *v.* Millard, 1 Madd. R. 227, 228; Battersbee *v.* Farringdon. 1 Swanst. R. 106, 113; Reade *v.* Livingston, 3 Johns. Ch. R. 481.

[2] Stillman *v.* Ashdown, 2 Atk. 481; Reade *v.* Livingston, 3 Johns. Ch. R. 481; Richardson *v.* Smallwood, Jac. R. 552.—As to *subsequent* creditors, it cannot be presumed that a voluntary conveyance is fraudulent, unless the party at the time is deeply indebted. Lord Alvanley, in Lush *v.* Wilkinson, (5 Ves. 387,), said, "A single debt will not do. Every man must be indebted for the common bills of his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time." See, also, Scarf *v.* Soulby, 16 Sim. 481. Mr. Chancellor Kent, in Reade *v.* Livingston (3 Johns. Ch. R. 498,) said, "Such a loose dictum, one would suppose, was not of much weight, as

§ 357. It has been justly remarked, that the distinction between cases where the party is indebted, and those where he is not indebted, is drawn from considerations too obvious to require illustration from cases. For, if a man indebted were allowed to divest himself of his property in favor of his wife or his children, his creditors would be defrauded. But if a man not indebted, and not meaning to commit a fraud, could not make an effective settlement in favor of such objects, because, by possibility, he might afterwards become indebted, it would destroy those family provisions, which are, under certain restrictions, a benefit to the public, as well as to the individual objects of them.[1]

§ 358. In regard to voluntary conveyances, there is an intermediate case touching creditors, which requires consideration. Suppose a party possessed of a large estate, and indebted at the same time to a considerable amount, but his debts bearing a small proportion to his actual property, should make a settlement or other voluntary conveyance, in favor of his wife or children, of a part of his estate, which should still leave a large surplus in his own hands, beyond the assets necessary to pay his debts; and afterwards, at a distance of time,

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there is no preceding case, which gives the least countenance to it." But Lord Alvanley probably meant no more than this; that, as to subsequent creditors, there could scarcely arise a presumption that the conveyance was intentionally fraudulent, (without which, such subsequent creditors could have no case for relief,) unless the party were deeply indebted at the time, and contemplated a fraud upon his creditors. In this view, there is much force in his Lordship's remarks. Indeed, this seems to be the view of the matter entertained by Mr. Chancellor Kent, in the same case. Ibid. 301. See, also, the remarks of Sir William Grant, in Kidney *v.* Coussmaker, 12 Ves. 155, and Sir Thomas Plumer, in Holloway *v.* Millard, 1 Madd. R. 414. See the Jurist, Jan. 6th, 1814, p. 461.

[1] Fonbl. Eq. B. 1, ch. 4, § 12, note.

he should lose or spend so much of his property, as not to leave enough to discharge such debts; the question would then arise, whether, in regard to such creditors, the settlement or other conveyance would be void or not. To such a case it is somewhat difficult to apply the preceding reasoning, so as to avoid the settlement or other conveyance; because there is no pretence to say, that upon the posture of the facts any actual fraud could be intended, or that the creditors were prejudiced, except by their own voluntary delay.

§ 359. Upon this question, a learned Judge (Mr. Chancellor Kent) has pronounced an opinion, which, from his acknowledged ability and sagacity, in sifting the authorities, is entitled to very great weight. His language is, "The conclusion to be drawn from the cases is, that if the party is indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, (that is, those antecedently due,) and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of creditors, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of existing debts. This is the clear and uniform doctrine of the cases."[1]

[1] Mr. Chancellor Kent, in Reade v. Livingston, 3 Johns. Ch. R. 500, 501. See, also, 2 Sch. & Lefr. 714; Fitzer v. Fitzer, 2 Atk. 511, 513;

§ 360. This doctrine is certainly *strictissimi juris*, and assumes, as a principle of law, that the mere indebtment of a party constitutes, *per se*, conclusive evidence of fraud in a voluntary conveyance, in all cases, where the creditors, to whom he is then indebted, are concerned.[1] Nay, it seems to go farther; for,

Taylor *v.* Jones, 2 Atk. 602, Bayard *v.* Hoffman, 4 Johns. Ch. R. 450; Richardson *v.* Smallwood, Jac R. 552. But see contrà, Verplank *v.* Strong, 12 Johns. R 536, and Jackson *v.* Town, 4 Cowen, R. 603, 604. See Seward *v* Jackson, 8 Cowen, R. 406, Wickes *v.* Clarke, 8 Paige, R. 161, 165 — That there is very great weight in this reasoning, cannot be questioned. That it is, upon principle, entirely satisfactory, as the true exposition of the statute of 13 Elizabeth, ch. 5, or of the Common Law, as to creditors may admit of some diversity of judgment. Lord Mansfield has justly remarked, in Cadogan *v.* Kennet, Cowp. 434, upon the statute of 13 Elizabeth, "Such a construction is not to be made in support of creditors, as will make third persons sufferers. Therefore, the statute does not militate against any transaction *bonâ fide* made, and where there is *no imagination* of fraud. And so is the Common Law." "A fair, voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted, at the time of his making a voluntary conveyance, is an *argument* of fraud. The question, in every case, therefore, is, whether the act done is a *bonâ fide* transaction, or whether a trick or contrivance to defeat creditors." If this language contains a true exposition of the law on this subject, then the question of fraud, or not, is open in all cases, where a man is indebted, as a matter of *fact*, and the law does not absolutely pronounce that the indebtment *per se* makes the settlement fraudulent. Lord Mansfield used language to a like effect, in Doe *v.* Routledge, Cowp. R. 708, 709, 710, 171 The doctrine (as we have seen) in Hinde's Lessee *v.* Longworth, (11 Wheaton, R 199,) stands upon grounds analogous to those of Lord Mansfield, and is not easily reconcilable with that in Reade *v.* Livingston, 3 Johns Ch R 500, 501. See, also, Holloway *v.* Millard, 1 Madd. R. 414, Jones *v* Boulter, 1 Cox, R. 288, 294, 295 In Richardson *v.* Smallwood, (Jac Rep 552,) the subject was considerably discussed by the Master of the Rolls; but from his reasoning I should not draw any other conclusion, than that an indebtment at the time, was a circumstance presumptive of a fraudulent intent. See Scarf *v* Soulby, 16 Sim. 481.

[1] In Townshend *v.* Windham, (2 Ves 10, 11,) Lord Hardwicke said "I know no case on the statute of 13 Eliz, where a man, indebted at the time, makes a voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as a part of his estate

upon the same reasoning, subsequent creditors have been allowed to participate in the same relief, even though, as to them alone, without such antecedent debts, there could be no relief.[1] The doctrine was certainly not understood by Lord Alvanley as going to this extent; for he put the case upon the proof of fraud arising from previous insolvency.[2]

§ 361. Where the conveyance is intentionally made to defraud creditors, it seems perfectly reasonable that it should be held void, as to all subsequent, as well as to all prior creditors, on account of ill faith.[3] But where the conveyance is *bonâ fide* made, and under circumstances demonstrative of the non-existence of any intention to defraud any creditor, there seems to be some difficulty in perceiving how the subsequent creditors can make out any right, as against the voluntary grantees, through the equity of the antecedent creditors.[4] Mr. Chancellor Kent, in the case above referred

for the benefit of his creditors, &c." "A man actually indebted, and conveying voluntarily, always means it to be in fraud of creditors, as I take it." Belt's Supp. p. 243, 247. But this language, though so very general, ought not, on that very account, to have more than general truth ascribed to it, where the indebtment is of a nature and extent, that makes it presumptive of fraud, or the conveyance is a direct and immediate interference with the rights of creditors. See Richardson *v.* Smallwood, Jac. Rep. 552.

[1] Reade *v.* Livingston, 3 Johns. Ch. R. 498, 499; Walker *v.* Burroughs, 1 Atk. 94; 1 Madd. Ch. Pr. 220, 221.

[2] Lush *v.* Wilkinson, 5 Ves. 387; S. C. cited in Kidney *v.* Coussmaker, 12 Ves. 150, 155. See also Copis *v.* Middleton, 2 Madd. R. 430; Reade *v.* Livingston, 3 Johns. Ch. R. 501; Stephens *v.* Olive, 2 Bro. Ch. R. 90.

[3] See Reade *v.* Livingston, 3 Johns. Ch. R. 499, 501; 1 Hovend. Supp. to Vesey, jr. p. 124, (7); Richardson *v.* Smallwood, Jac. Rep. 552; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 413; Newland on Contracts, ch. 33, p. 389.

[4] See Holloway *v.* Millard, 2 Madd. R. 419; Walker *v.* Burroughs,

to, after having remarked, "That there is no doubt, in any case, as to the safety and security of the *then existing* creditors," proceeded to state: "No voluntary *post-nuptial* settlement was ever permitted to affect them. And the cases seem to agree, that the *subsequent* credi-

1 Atk. R. 91.—In Taylor *v.* Jones, (2 Atk. 600,) the Master of the Rolls manifestly proceeded upon the ground, that the conveyance was fraudulent in fact. In Stephens *v.* Olive, (2 Bro. Ch. R. 92,) where there were prior debts, but secured by mortgage, Lord Kenyon held the settlement good. See also George *v.* Millbanke, 9 Ves. 194, that a settlement, containing a provision for payment of debts, would be good against all future creditors. Lord Eldon there said: "In general cases, *primâ facie*, a voluntary settlement will be taken to be fraudulent." But this supposes that it is not conclusive of fraud; but that it is open to be rebutted. In Kidney *v.* Coussmaker, (12 Ves. 136, 155,) Sir William Grant said: "Though there has been much controversy, and a variety of decisions upon the question, whether such a settlement (a voluntary settlement) is fraudulent as to any creditors, except such as were creditors at the time, I am disposed to follow the latest decision, that of Montague *v.* Lord Sandwich, which is, that the settlement is fraudulent only as against such creditors as were creditors at the time." Montague *v.* Lord Sandwich is nowhere reported at large. It was decided in 1797, by Lord Rosslyn, and is referred to in 5 Ves. 386, and 12 Ves. 148. Mr. Chancellor Kent has said, that, in this case, "Lord Rosslyn declared a settlement void as to creditors prior to its date. There was no question of insolvency made; but it was clearly held by Lord Rosslyn in this case (see 12 Ves. 156, note,) that, if the settlement be affected, as fraudulent against such prior creditors, the subject is thrown into assets, and all subsequent creditors are let in." He manifestly founds this remark upon the Reporter's note (*a*) in 12 Ves. 156. But I have not been able to ascertain, that Lord Rosslyn gave any such relief, in this case, to subsequent creditors. The note in 5 Ves. 586, and 12 Ves. 148, would rather lead my mind to an opposite conclusion, that he gave relief only to *prior* creditors *pro tanto*. Mr. Atherly (Marr. Sett. ch. 13, p. 213, note 1,) has expressed an unqualified dissent from this supposed opinion of Lord Rosslyn; and, in my judgment, with very great reason. Where the settlement is set aside, as an intentional fraud upon creditors, there is strong reason for holding it so, as to subsequent creditors, and to let them into the full benefit of the property. Richardson *v.* Smallwood, Jac. Rep. 532. See also Holloway *v.* Millard, 1 Madd. R. 414. But see Walker *v.* Burroughs, 1 Atk. 94, on this point.

tors are let in only in particular cases; as, where the settlement was made in contemplation of future debts; or where it is requisite to interfere and set aside the settlement in favor of the prior creditors; or where the subsequent creditor can impeach the settlement, as fraudulent, by reason of the prior indebtment."[1] And he finally arrived at the conclusion, "That fraud, in a voluntary settlement, was an inference of law, and ought to be so, so far as it concerned *existing* debts. But that, as to subsequent debts, there is no such necessary legal presumption; and there must be proof of fraud in fact; and the indebtment at the time, though not amounting to insolvency, must be such as to warrant that conclusion."[2]

§ 362. The same subject has undergone repeated discussions in the Supreme Court of the United States. The doctrine established in that court is, that a voluntary conveyance, made by a person, not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors, upon the mere ground of its being voluntary. It must be shown to have been fraudulent, or made with a view to future

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[1] Reade *v.* Livingston, 3 Johns. Ch. R. 497, 501. See Richardson *v.* Smallwood, Jac. Rep. 552. See on the point, whether a subsequent creditor can set aside a post-nuptial settlement, a learned dissertation in the English Jurist for January, 1844, No. 365, p. 461, 462. In Ede *v.* Knowles, 2 Younge & Coll. N. R. 172, 178, Mr. Vice-Chancellor Bruce said: "The plaintiff does not allege by his bill, that he was a creditor at the time of the settlement. I apprehend, that a deed can only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time, though when it shall have been set aside subsequent creditors may be let in."

[2] Reade *v.* Livingston, 3 Johns. Ch. R. 497, 501. See Richardson *v.* Smallwood, Jac. Rep. 552; Scarf *v.* Soulby, 16 Sim. 481.

debts.[1] And, on the other hand, the mere fact of indebtment at the time does not, *per se*, constitute a substantive ground, to avoid a voluntary conveyance for fraud, even in regard to prior creditors. The question, whether it is fraudulent or not, is to be ascertained, not from the mere fact of indebtment at the time alone, but from all the circumstances of the case. And if the circumstances do not establish fraud, then the voluntary conveyance is deemed to be above all exception. The language of the Court, upon the occasion alluded to, was as follows: "A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under circumstances. But the mere fact of being indebted to a small amount would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to a child was a reasonable provision, according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud; but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side."[2] And this language (it should be remembered) was used in a case where the conveyance was sought to be set aside

[1] Sexton *v.* Wheaton, 8 Wheaton, R. 229, 230; Hinde's Lessee *v.* Longworth, 11 Wheaton, R. 199; Bennett *v.* Bedford Bank, 11 Mass. R. 421.

[2] Hinde's Lessee *v.* Longworth, 11 Wheat. R. 199. See also Verplank *v.* Sterry, 12 Johns. R. 536, 554, 556, 557; Partridge *v.* Gopp, Ambler, R. 597, 598; S. C. 1 Eden, R. 167, 168, 169; Gilmore *v.* North American Land Co., Peters, C. R. 461.

by persons claiming as judgment creditors upon antecedent debts.[1]

§ 362 *a*. The same doctrine seems now well established in England. In a recent case, where the very point was before the Court,[2] Lord Langdale said: "There has been a little exaggeration in the arguments on both sides, as to the principle on which the Court acts in such cases as these; on one side it has been assumed that the existence of any debts at the time of the execution of the deed, would be such evidence of a fraudulent intention, as to induce the Court

[1] The doctrine of the Supreme Court seems an entire coincidence with that held by Lord Mansfield, in Cadogan *v.* Kennett, Cowp. R. 432, 434, and Doe *v.* Routledge, Cowp. R. 705, 710, 711, 712. See also Lush *v.* Wilkinson, 5 Ves. 387; Holloway *v.* Millard, 1 Madd. R. 414; Kidney *v.* Coussmaker, 12 Ves. 155; Sagitary *v.* Hide, 2 Vern. 44. It approaches very nearly to the doctrine held in the Supreme Court of the United States, as to the construction of the statute of 27th of Elizabeth, as to subsequent purchasers; for in the other case the voluntary conveyance is not held absolutely void; but only the burthen of proof to repel fraud is thrown upon the claimants under it. Cathcart *v.* Robinson, 5 Peters, R. 277, 280, 281. See also Verplank *v.* Sterry, 12 Johns. R. 536, 554, 556, 557, 558. In this last case, Mr. Justice Spencer, in delivering his opinion in the Court of Errors, held the doctrine maintained in the Supreme Court of the United States, as to creditors, in the broadest terms. "If," said he, "the person making a settlement, is insolvent, or in doubtful circumstances, the settlement comes within the statute of 13th of Elizabeth, ch. 5. But, if the grantor be not indebted to such a degree, as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors, for, in the language of the decisions, it is free from the imputation of fraud." Ibid. 577. Mr. Newland maintains the same opinion with great strength. Newland on Contracts, ch. 23, p. 384, 385. Mr. Fonblanque has remarked, that, "If a conveyance or gift be of the whole, or of the greater part of the grantor's property, such conveyance or gift would be fraudulent; for no man can voluntarily divest himself of all, or the most of what he has, without being aware that future creditors will probably suffer by it." 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*).

[2] Townsend *v.* Westacott, 2 Beavan, R. 340, 345.

to set aside a voluntary conveyance, and oblige the Court to do so under the statute of Elizabeth. I cannot think the real and just construction of the statute warrants that proposition, because there is scarcely any man who can avoid being indebted to some amount; he may intend to pay every debt as soon as it is contracted, and constantly use his best endeavors to have ample means to do so, and yet may be frequently if not always, indebted in some small sum; there may be a withholding of claims contrary to his intention, by which he is kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand, it is said that something amounting to insolvency must be proved, to set aside a voluntary conveyance; this, too, is inconsistent with the principle of the act, and with the judgments of the most eminent judges. The evidence as to Westacott's property, when he executed the settlement, I cannot rely on; it is brought forward many years after the witnesses had known it, and they speak to the value of the property without taking into consideration any charges that might be upon it; and I am not in a situation of knowing whether there were any charges upon it."

§ 363. The same doctrine has been asserted by the Supreme Court of Connecticut, in a recent case, which hinged exclusively upon the same point. It was there laid down as the unanimous opinion of the Court, and there is much persuasiveness as well as reasonableness

Equity in the doctrine, that, "Where there is no actual fraudulent intent, and a voluntary conveyance is made to a child, in consideration of love and affection, if the grantor is in prosperous circumstances, unembar-

rassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his state and condition in life, comprehending but a small portion of his estate, leaving ample funds unencumbered for the payment of his debts; then, such conveyance will be valid against conveyances (debts) existing at the time. But, though there be no fraudulent intent, yet, if the grantor was considerably indebted and embarrassed at the time, and on the eve of bankruptcy; or, if the value of the gift be unreasonable, considering the condition in life of the grantor, disproportioned to his property, and leaving a scanty provision for the payment of his debts; then, such conveyance will be void as to creditors." [1]

[1] Salmon *v.* Bennett, 1 Connect. Rep. 525, 548 to 551; S. P. Newland, on Contracts, ch. 28, p. 384, 385. — Mr. Chancellor Kent, in commenting on this case says: "I have not been able to find the case in which a mere voluntary conveyance to a wife, or child, has been plainly or directly held good against the creditor at the time. The cases appear to me to be upon the point, uniformly in favor of the creditor." (Reade *v.* Livingston, 3 Johns. Ch. R. 504.) Mr. Atherley (Marr. Sett. ch. 13, p. 212 to 219,) maintains the same doctrine. He holds, that if the party is in debt, at the time of settlement, it is void, as to subsequent as well as to prior creditors; and this without any reference to the amount of the debts. See note to Bigelow's Dig. (2d edition,) p. 200, title, *Conveyance*. On the other hand, it may be asserted with some confidence, that there is no English case which pointedly decides that such a conveyance is void, merely from the circumstance that the party was indebted at the time, if the debts bore no proportion to his assets, and there was no presumption of meditated fraud. The cases cited by Mr. Chancellor Kent do not appear to me to reach the point, at least not in a form free from difficulty and obscurity. The case of St. Amand *v.* The Countess of Jersey, 1 Comyn, R. 255, is quite obscurely reported; but it may be gathered from that report that the grantor was deeply indebted at the time, and probably there was a strong presumption of fraud in fact. The case of Fitzer *v.* Fitzer, 2 Atk. R. 511, was the case of a subsequent creditor, having an assignment under the insolvent act of 2 Geo. II., ch. 2, to compel an execution of the trusts of a deed of separation in favor of a wife. It was

§ 364. The same doctrine has been expressly held, on different occasions, by the Judges of the Supreme

not the case of a voluntary conveyance held void. In Taylor *v.* Jones, 2 Atk. 600, 602, the reasoning of the Master of the Rolls certainly goes to the maintenance of the doctrine. But the judgment seems ultimately to have turned upon the point that the conveyance was fraudulent, and there was a trust in it in favor of the grantor *for life*. Some part of the doctrine of the Master of the Rolls would not now be held maintainable. The doctrine of Lord Hardwicke, in Russell *v.* Hammon, 1 Atk. 35, by no means warrants so general a conclusion. His Lordship's language, in Walker *v.* Burroughs, 1 Atk. 39, though broad and sweeping, does not come up to it; and the case turned on the Statute of Bankruptcy, 21 Jac. 1, ch. 15. Townshend *v.* Windham, 2 Ves. 1, 10, 11, was the case of the execution of a power; and Lord Hardwicke held the property assets for the payment of the debts of existing creditors. The question did not arise, whether the debtor had other estate at the time, sufficient to pay his debts; and Lord Hardwicke treated the case as an intentional execution of the power to defraud creditors. On the other hand, the case of Stephens *v.* Olive, 2 Bro. Ch. R. 90, shows that the fact of indebtment is not sufficient to set aside the conveyance, if the debt is actually secured by mortgage. Now, it is somewhat difficult to distinguish between the case of a specific security for debts, and a general security, founded upon an ample fortune in the grantor. Each operates, if at all, to repel the same imputation of fraudulent intent; and if the law makes the mere fact of indebtment *per se* a fraud as to existing creditors, the security, in either case, cannot control the presumption. The doctrine, too, of Lord Alvanley, in Lush *v.* Wilkinson, 5 Ves. 383, trenches upon the conclusiveness of the presumption. And, notwithstanding Mr. Chancellor Kent's doubts on this case, in Reade *v.* Livingston, 3 Johns. Ch. R. 497, 498, it has been repeatedly recognized in later cases. 12 Ves. 150, 155; 2 Madd. R. 430. It must, therefore, be admitted, that there is some difficulty in reconciling the language of the English cases, although the cases themselves may be all distinguishable from each other. The question really resolves itself into this, whether a voluntary conveyance is void against creditors, because it ultimately operates to defeat the debts of existing creditors, or whether it is void, only when, from the circumstances, the presumption fairly arises that it either was intended to defraud, or did necessarily defraud, such creditors. Sir Thomas Plumer, in Holloway *v.* Millard, 1 Madd. R. 417, 419, manifestly treated the statute of 13 of Eliz. as only applying to fraudulent conveyances. "This conveyance is not one of that description (i. e. to defraud creditors.) It is not fraudulent merely because it is voluntary. A voluntary conveyance may be made of real or personal property without any consideration

Court of New York; and in the latest case on this subject, it has been expressly affirmed that neither a creditor, nor a purchaser, can impeach a conveyance, *bonâ fide* made, founded on natural love and affection, and free from the imputation of fraud, and where the grantor had, independent of the property granted, an ample fund to satisfy his creditors. This qualification, however, was then annexed to the doctrine, that, if a fraudulent use is made of such a settlement, it may be carried back to the time when the fraud was commenced.[1]

§ 365. Under this apparent diversity of judgment, it would ill become the commentator to interpose his own views as to the comparative weight of the respective judicial opinions. It may probably be found in the

whatever, and cannot be avoided by subsequent creditors, unless it be of the description mentioned in the statute, &c. Its being voluntary is *primâ facie* evidence (he does not say *conclusive*) where the party is *loaded* with debt at the time, of an intent to defeat and defraud his creditors; but, if unindebted, his disposition is good." He afterwards added: "A voluntary disposition, even in favor of a child, is not good, if the party is indebted at the time." But this must be taken in connection with his preceding remarks, as applying to a case of being *loaded* with debts. See also Copis *v.* Middleton, 2 Madd. R. 426, 428, 430. In Jones *v.* Boulter, (1 Cox, R. 288, 294,) Lord Ch. B. Skinner said: "There is no mention in the act (Stat. 13 Eliz.) of voluntary conveyances; and the question has always been whether, in the transaction, there has been fraud or covin. *Here were creditors at the time*, and this is said always to have been a badge of fraud. It is true that this circumstance is always strong evidence of fraud. *But, if there are other circumstances in the case, that alone will not be sufficient.*" Eyre, B., is still more explicit. He said: "The 13 of Elizabeth is a wholesome law, plainly penned, and I wonder how artificial reason could puzzle it. An artificial construction has entangled Courts of Justice, namely, that a voluntary conveyance of a person indebted at the time, is to be deemed fraudulent." See, also, 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*).

1 Jackson *v.* Town, 4 Cowen, R. 604; Verplank *v.* Sterry, 12 Johns. R. 536. See also Huston's Admr. *v.* Cantril, 11 Leigh, R. 136.

future, as it has been in the past, that professional opinions will continue somewhat divided upon the subject, until it shall have undergone a more searching judicial examination, not upon authority merely, but upon principle. If the question were now entirely freed from the bearing of *dicta* and opinions in earlier times, there is much reason to believe that it would settle down into the proposition, (certainly most conformable to the language of the Statute of 13th of Eliz.) that mere indebtment would not *per se* establish, that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors.[1] In the latest English

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[1] See Jones *v.* Boulter, 1 Cox, R. 288, 294, 295; Stephens *v.* Olive, 2 Bro. Ch. R. 90. See, also, 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 412, 413; Twyne's case, 3 Co. R. 81 b.; Newland on Contr. ch. 23, p. 383, 384, 385, where the learned author asserts the opinion intimated in the text, in a positive manner, and maintains it by very cogent reasoning. — Mr. Chancellor Kent, in his learned opinion, already noticed, (3 Johns. Ch. R. 506,) has traced out some of the analogies between the English law and the continental law on this subject, and I gladly refer the learned reader to his citations. Voet has discussed the subject in his Commentaries, 1 Voet, ad Pand. Lib. 39, tit. 5, § 20; Pothier, in his Traité des Donations entre Vifs, § 2; and Grenier, in his Traité des Donations, Tom. 1, Partie 1, ch. 2, § 2, p. 253, &c. Voet holds, that the donee is liable to the existing, but not to the future debts of the donor, when he is donee of all, or of the major part of the donor's property: utrum donatis omnibus bonis aut majore eorum parte. Pothier says, that the donee of particular things is not bound to pay the existing debts of the donor, unless he knows that the donor was insolvent at the time, or that he will not have sufficient left to pay his creditors, and the donation is in fraud of his creditors. But those, who are technically called *universal donees*, *donataires universels* (which embrace not only donees of the whole property of the donor, but of the whole of a particular kind, as

case, touching this subject, it was unequivocally held, that a voluntary deed, made in consideration of love and affection, is not necessarily void as against the creditors of the grantor, upon the Common Law, or the Statute of Elizabeth, but that it must be shown from the actual circumstances, that the deed was fraudulent, and necessarily tended to delay or defeat creditors.[1]

§ 366. There is another qualification of the doctrine respecting the rights of creditors, which deserves attention in this place, not only from its practical importance in regard to the jurisdiction of Courts of Equity, but also from the fact that it has given rise to some diversity of judicial opinion. The point intended to be suggested is this, whether, in order to make a conveyance void, as against existing creditors, it is indispensable that it should make a transfer of property, which could be taken in execution by the creditors, or compulsorily applied to the payment of the debts of the grantor; or whether the rule equally applies to the conveyance of any property whatsoever of the grantor, although not directly so applicable to the discharge of debts.

§ 367. The English doctrine upon this subject, after various discussions, has at length settled down in favor of the former proposition, namely, that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable, that it should transfer property, which would be liable to be taken in execution for the payment of debts. The reasoning by which this doctrine is established, is, in substance, that

movables, &c.) are liable for the existing debts of the donor, but not for his future debts.

[1] Gale *v.* Williamson, 8 Mees. & Welsb. R. 405, 409, 410, 411.

the statute of 13th of Elizabeth, did not intend to enlarge the remedies of creditors, or to subject any property to execution, which was not already, in Law or Equity, subject to the rights of creditors. That a voluntary conveyance of property not so subject, could not be injurious to creditors, nor within the purview of the Statute, because it would not withdraw any fund from their power, which the law had not already withdrawn from it. And that would be a strange anomaly, to declare that to be a fraud upon creditors, which in no respect varied their rights or remedies. Hence, it has been decided that a voluntary settlement of stock, or of choses in action, or of copyholds, or of any other property, not liable to execution, is good, whatever may be the state and condition of the party as to debts.[1]

§ 368. Mr. Chancellor Kent, in a very elaborate argument, has discussed the same subject, and doubted the soundness of the reasoning by which that doctrine is attempted to be established. He maintains that, in cases of fraudulent alienations of this sort, Courts of Equity ought to interfere, and grant remedial justice, whether the property could be reached by an execution at law or not, for otherwise, a debtor, under shelter of it, might convert all his property into stock, and settle it upon his family, in defiance of his creditors, and to the utter subversion of justice. And he further insists, that the cases antecedent to the time of Lord Thurlow, and

[1] See Dundas *v.* Dutens, 1 Ves. jr. 196, S. C. 2 Cox, R. 196, McCarthy *v* Gould, 1 B & Beat. 390; Grogan *v.* Cooke, 2 B. & Beatt. 233; Cullard *v.* Estwick, 1 Anst. R. 381, Nantes *v.* Conork, 9 Ves. 188, 189; Rider *v.* Kidder, 10 Ves. 368, Gôy *v.* Pearkes, 18 Ves. 196, 197; Cochrane *v.* Chambers, 1825, MSS cited in Mr. Blunt's note to Horn *v.* Horn, Ambler, R. 79, Matthews *v.* Feaver, 1 Cox, R. 278.

especially in the time of Lord Hardwicke and Lord Northington, do sustain his own doctrine.[1]

§ 369. But, whatever may be the true doctrine, as to these critical and nice questions, it is certain that a conveyance, even if for a valuable consideration, is not, under the statute of 13th of Elizabeth, valid in point of law from that circumstance alone. It must also be *bonâ fide;* for if it be made with intent to defraud or defeat creditors, it will be void, although there may, in the strictest sense, be a valuable, nay, an adequate consideration. This doctrine was laid down in Twyne's Case, (3 Co. R. 81), and it has ever since been steadily

[1] Bayard *v.* Hoffman, 4 Johns. Ch. R. 452 to 459; Edgell *v.* Haywood, 3 Atk. 352. See also Mitf. Pl. by Jeremy, 115, and 1 Jac. & Walk. 371; M'Durmut *v.* Strong, 4 Johns. Ch. R. 687; Spader *v.* Davis, 5 Johns. Ch. R. 280; S. C. 20 Johns. R. 554. — The cases cited by Mr. Chancellor Kent go very far to establish the doctrine which he contends for. Taylor *v.* Jones, (2 Atk. R. 600,) is a decision of the Master of the Rolls, directly in point. The case of King *v.* Dupine, cited in Mr. Saunders's note to 2 Atk. 603, note 2, and reported 3 Atk. R. 192, 200, is strong the same way; and so is Horn *v.* Horn, Ambl. R. 79. Upon this latter case, Lord Thurlow is reported to have said, "The opinion in Horn *v.* Horn is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, which, if set aside, leaves the stock in the name of a person, where you could not touch it." Grogan *v.* Cooke, 2 B. & Beatt. 233. In Partridge *v.* Gopp, Ambl. R. 596; S. C. 1 Eden, R. 163, Lord Chancellor Northington made the donees of £500 each refund in favor of creditors. But he seems to have been impressed with the opinion, that the transaction was fraudulent, or, to use his own words, that the transaction smelt of craft and experiment. The transaction was secret; and, Dona clandestina sunt semper suspiciosa. Twyne's case, 3 Co. R. 81. Whatever may be the true doctrine on this subject, a distinction may, perhaps, exist between cases, where a party indebted actually converts his existing *tangible property* into stock, to defraud creditors; and cases, where he becomes possessed of stock without indebtment at the time; or if indebted, without having obtained it by the conversion of any other tangible property. Where tangible property is converted into stock to defraud existing creditors, there may be a solid ground to follow the fund, however altered.

adhered to.[1] Cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and, therefore, set aside.[2] Thus, where a person, with knowledge of a decree against the defendant, bought the house and goods belonging to him, and gave a full price for them, the Court said that the purchase, being with a manifest view to defeat the creditor, was fraudulent, and, notwithstanding the valuable consideration, void.[3] So, if a man should know of a judgment and execution, and, with a view to defeat it, should purchase the debtor's goods, it would be void; because the purpose is iniquitous.[4]

§ 370. But cases of this sort are carefully to be distinguished from others, where a sale, or assignment, or other conveyance, merely amounts to giving a preference in payment to another creditor, or where the assignment or conveyance is made for the benefit of all creditors; for such a preference, or such a general assignment or conveyance, is not treated as *malâ fide*, but as merely doing what the law admits to be rightful. A sale, assignment, or other conveyance, is not necessarily fraudulent, because it may operate to the prejudice of a particular creditor.[5] But secret preferences made to

[1] Newland on Contr. ch. 23, p. 370, 371; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Cadogan *v.* Kennet, Cowp. R. 434; Worseley *v.* De Mattos, 1 Burr. 474, 475.

[2] Cadogan *v.* Kennett, Cowp. R. 434; Bridge *v.* Eggleston, 14 Mass. R. 245; Harrison *v.* Trustees of Phillips Academy, 12 Mass. R. 456.

[3] Ibid.; Worsely *v.* De Mattos, 1 Burr. 474, 475.

[4] Ibid.

[5] Holbird *v.* Anderson, 5 T. R. 235; Pickstork *v.* Lyster, 3 M. & Selw. R. 371.

induce particular creditors to sign a general assignment, and unknown to the other creditors who execute the assignment, are treated as frauds upon such creditors.[1]

§ 371. It may be added that, although voluntary conveyances are, or may be, void, as to existing creditors, they are perfect and effectual, as between the parties, and cannot be set aside by the grantor, if he should become dissatisfied with the transaction.[2] It is his own folly to have made such a conveyance. They are not only valid as to the grantor, but also as to his heirs, and all other persons claiming under him in privity of estate with notice of the fraud.[3] A conveyance of this sort (it has been said, with great truth and force) is void only as against creditors; and then only to the extent in which it may be necessary to deal with the conveyed estate for their satisfaction. To this extent and to this only, it is treated as if it had not been made. To every other purpose it is good. Satisfy the creditors, and the conveyance stands.[4] But the assignees of a bankrupt, or an insolvent debtor, are entitled to the same rights and stand in the same predicament as the creditors themselves, and are deemed to represent them.[5]

§ 372. The circumstances under which a convey-

[1] Post, § 378.

[2] Petre *v.* Espinasse, 2 Mylne & Keen, 496; Bill *v.* Cureton, Id. 530, 10.

[3] Randall *v.* Phillips, 3 Mason, R. 378.

[4] Sir W. Grant, in Curtis *v.* Price, 12 Ves. 103; Worseley *v.* De Mattos, 1 Burr. 474; 1 Madd. Ch. Pr. 222, 223; 1 Fonbl. Eq. B. 1, ch. 4, § 12, note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4; Malin *v.* Garnsey, 16 Johns. R. 189; Reichart *v.* Castelor, 5 Binn. 109; Drinkwater *v.* Drinkwater, 4 Mass. R. 354.

[5] Doe *v.* Ball, 11 Mees. & Welsb. 531, 533.

ance will be deemed purely voluntary, or will be deemed affected by a consideration valuable in itself, or in furtherance of an equitable obligation, are very important to be considered; but they more properly belong to a distinct treatise upon the nature and validity of settlements. It may not, however, be useless to remark in this place, that a settlement made upon a wife after marriage is not to be treated as wholly voluntary, where it is done in performance of a duty, which a Court of Equity would enforce. Thus, if a man should contract a marriage by stealth with a young lady, having a considerable fortune in the hands of trustees, and he should afterwards make a suitable settlement upon her in consideration of that fortune, the settlement would not be set aside in favor of the creditors of the husband, since a Court of Equity would not suffer him to take possession of her fortune without making a suitable settlement upon her.[1] It has been said that a post-nuptial voluntary agreement by a father to make a provision for a child, will be specifically enforced in Equity, as founded in moral duty.[2] But this doctrine, although it has the support of

[1] Post, §§ 1372, 1373, 1377, 1415; Moor *v.* Rycault, Prec. Ch. 22, and other cases cited in 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (*b*); Id. ch. 2, § 6, note (*k*); Jones *v.* Marsh, Cas. T. Talb. 64; Wheeler *v.* Caryll, Amb. R. 121; Jewson *v.* Moulton, 2 Atk. 417; Middlecome *v.* Marlow, 2 Atk. 519; Ward *v.* Shallet, 2 Ves. 16; Ramsden *v.* Hylton, 2 Ves. 304; Arundell *v.* Phipps, 10 Ves. 139; Russell *v.* Hammond, 1 Atk. 13; Wickes *v.* Clark, 8 Paige, R. 161.

[2] Elis *v.* Nimmo, Lloyd & Goold, R. 333. But see Moore *v.* Crofton, 3 Jones & Lat. 438; Post, § 706, 706 a; 787, 793 b; 973. See, also, that a voluntary assignment of a bond is a conclusive title to the assignee against the estate of the assignor; Fortescue *v.* Barnett, 3 M. & Keen, 36, 42, 43; Ante, § 176; Post, § 433, note (1); Jeffreys *v.* Jeffreys, 1 Craig & Phillips, 138, 141.

highly respectable authorities, seems now entirely overthrown.[1]

§ 373. In like manner, what circumstances, connected with voluntary or valuable conveyances, are badges of fraud, or raise presumptions of intentional bad faith, though very important ingredients in the exercise of equitable jurisdiction, fall rather within the scope of treatises on evidence, than of discussions touching jurisdiction.[2] It may, however, be generally stated, that whatever would at law be deemed badges of fraud, or presumptions of ill faith, will be fully acted upon in Courts of Equity. But, on the other hand, it is by no means to be deemed a logical conclusion, that, because a transaction could not be reached at law as fraudulent, therefore it would be equally safe against the scrutiny of a Court of Equity; for a Court of Equity requires a scrupulous good faith in transactions which the law might not repudiate. It acts upon conscience, and does not content itself with the narrower views of legal remedial justice.[3]

§ 374. The question has been much discussed, how far a settlement made after marriage, in pursuance of an asserted parol agreement before marriage, is valid, as against creditors, in cases affected by the Statute of Frauds. There is no doubt, that such a settlement, made in pursuance of a prior valid written agreement, would be completely effectual against creditors. But

[1] See Holloway v. Headington, 8 Sim. R. 324, 325; and Jeffreys v. Jeffreys, 1 Craig & Phillips, 138, 141; Post, § 433, 706, 706 a; 787, 793, 973.

[2] See 1 Eq. Abrid. 148, E.; 3 Stark. on Evid. Pt. 4, p. 615 to 622; Twyne's Case, 3 Co. R. 80.

[3] See 1 Fonbl. Eq. B. 1, ch. 2, § 8, notes; Id. ch. 3, § 4; Id. ch. 4, § 12, 13, and notes.

the difficulty is, whether such a settlement, executed in pursuance of a parol contract, obligatory *in foro conscientiæ*, ought to be protected, when made, although it might not be capable of being enforced, if not made. It is certain that the mere performance of a moral duty even of the most meritorious nature, has not been deemed sufficient to protect a voluntary conveyance, even in favor of a deeply injured party, to whom it is designed to be a compensation for injustice and deceit.[1] And hence the difficulty is increased of giving effect to a contract, which, in its own character, although founded upon an intrinsic valuable consideration, is yet, in contemplation of law, deemed to be a *nudum pactum*. There have been some struggles in Courts of Equity to maintain the efficacy of such a *post-nuptial* settlement against creditors, where it purported to be founded upon a parol agreement before marriage, recited in the settlement. But the strong inclination of these Courts now seems to be, to consider such a settlement incapable of support from any evidence of a parol contract; since it is in effect an attempt to supersede the Statute of Frauds, and to let in all the mischiefs against which that statute was intended to guard the public generally, and especially to guard creditors.[2]

[1] Gilham *v.* Locke, 9 Ves. 612; Lady Cox's case, 3 P. Will. 339; Priest *v.* Parrott, 2 Ves. 160.

[2] See Atherley on Marr. Sett. ch. 9, p. 149. — According to Mr. Cox's Report of Dundas *v.* Dutens, (2 Cox, R. 235,) Lord Thurlow actually held such a settlement valid, asserting that it could not be deemed fraudulent, and that the cases, though they had gone a great way in treating settlements after marriage as fraudulent, had never gone to such a length as that. Mr. Cox, having been of counsel in that case, his report is probably accurate. The point is not quite so strongly stated in the report of

§ 375. The same policy, of affording protection to the rights of creditors, pervades the provisions of the

the same case in 1 Ves. jr. 196. But Lord Thurlow is there made in effect to say: "If the husband made an agreement before marriage, that he would settle, and then, in fraud of the agreement, got married, that he would be bound by the agreement; and he thought there was a case in point. That it would be a kind of fraud, against which the Court would relieve. If there was a *parol* agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner. And he then asked the question, whether there was any case where, in the settlement, the parties recite an agreement before marriage, in which it has been considered as within the statute?" The distinction between cases of fraud and a mere reliance upon a parol agreement for a settlement before marriage and in consideration thereof, is expressly taken in Lady Montacute *v.* Maxwell (1 P. Will. 619, 620); S. C. Prec. in Ch. 526; 1 Str. R. 236; 1 Eq. Cas. Abr. p. 19, pl. 4, where the Lord Chancellor said: "In cases of fraud, Equity should relieve, even against the words of the statute, &c. But where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making these promises void, Equity will not interfere." 1 Ves. jr. 199, note (*a*); Post, § 768. This may be correct in cases of parol promises in consideration of marriages, for the Statute of Frauds (29 Car. 2, ch. 3, § 4,) expressly declares that no action shall be brought whereby "to charge any person upon an agreement made in consideration of marriage," unless the agreement shall be in writing and signed by the party to be charged therewith; for in such a case it seems to have been held, that the marriage is not a part performance to take the case out of the statute. See Montacute *v.* Maxwell, ibid.; Dundas *v.* Dutens, 1 Ves. jr. 196; S. C. 2 Cox, R. 235; Redding *v.* Wilkes, 3 Bro. Ch. R. 400, 401; Taylor *v.* Buck, 1 Ves. R. 297, 298. All this seems perfectly correct. But suppose the party to have fulfilled his parol promise after marriage, ought a Court of Equity to disturb the settlement in favor of creditors? The marriage, in such a case, is not the less a valuable consideration, because a parol promise was relied on; and if relied on as valid, and the marriage is had on the faith thereof, is not the non-fulfilment of it a fraud upon the other party, whether intentional or not? Mr. Chancellor Kent, in Reade *v.* Livingston (3 Johns. Ch. R. 481,) after reviewing the authorities, has come to a conclusion unfavorable to the validity of such a settlement. Sir William Grant, in Randall *v.* Morgan, (12 Ves. 67,) seemed to think the question not settled. An anonymous case in Preced. in Ch. 101, is in favor of such a settlement. See, also, Ramsden *v.* Hyl-

statute of 3d and 4th of William & Mary, ch. 14, respecting devises in fraud of creditors, and of the statutes made in the American States *in pari materia*.[1] There is an apparent anomaly in Equity Jurisprudence upon this subject, not easily reconcilable with sound principles. The statute of William & Mary is confined to fraudulent devises; and, therefore, fraudulent conveyances, whether voluntary or not, are not reached by it. And, hence, it has been adjudged in England, that, if a man makes a conveyance of lands, in his lifetime, in order to defraud his creditors, and dies, his bond creditors have no right to set aside the conveyance; for the statute (it is said) was only designed to secure such creditors against any imposition, which might be supposed in a man's last sickness. But, if he gave away his effects in his lifetime, this prevented the descent of so much to the heir; and, consequently, took away their remedy against the heir, who was liable only in respect to land descended. And, as a bond is no lien whatever on lands in the hands of the obligor, much less can it be so when they are given away to a stranger.[2] This doctrine has been strongly questioned; and, at the time, when it was promulgated, gave great dissatisfaction.[3] And, hence, we may see the reason why voluntary conveyances of lands cannot be set aside, except by creditors, who have reduced

ton, 2 Ves. 308, the remarks of Lord Hardwicke. See, also, Lavender *v.* Blackstone, 2 Lev. R. 146, 147; 1 Vent. 194; Guchenback *v.* Rose, 4 Watts & Serg. 546.

[1] See 1 Roberts on Wills, ch. 1, § 20; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 415, 416; 1 Fonbl. Eq. B. 1, ch. 4, § 14, note (*i*).

[2] Parslow *v.* Weaden, 1 Eq. Abridg. 14, Pl. 7; 1 Fonbl. Eq. B. 1, ch. 4, § 12, 14, and note (*l*).

[3] Ibid.; and Jones *v.* Marsh. Cas. T. Talb. 64.

their debts to judgment before the death of the party; for, until that time, they constitute no lien on the land.[1]

§ 376. In America, however, the policy of the Legislature has taken a much wider and more effectual range to obtain its objects. Generally, if not universally, lands and other hereditaments are with us made assets for the payment of debts, as auxiliary to the personal property of the deceased. And, if the party, in his lifetime, has fraudulently conveyed his estate, with a view to defeat his creditors upon his decease, the real assets are subject to the same disposition as if no such conveyance had been made.[2] The French law seems to have proceeded upon a policy equally broad and salutary; and has enabled creditors, in cases of insolvency, to rescind alienations, either voluntary, or in fraud of their rights.[3]

§ 377. These cases of interposition in favor of creditors, being founded upon the provisions of positive statutes, a question was made at an early day whether they were exclusively cognizable at law; or they could be carried into effect also in Equity. The jurisdiction of Courts of Equity is now firmly established; for it extends to cases of fraud, whether provided against by statute, or not. And, indeed, the remedial justice of a Court in Equity, in many cases arising under these statutes, is the only effectual one, which can be admi-

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 12; Gilb. Lex Prætoria, p. 293, 294; Colman *v.* Croker, 1 Ves. jr. 160. See Bean *v.* Smith, 2 Mason, R. 282 to 285. See Mitf. Pl. Eq. by Jeremy, 126, 127; Jackson *v.* Caldwell, 1 Cowen, R. 622. But see Lister *v.* Turner, 5 Hare, R. 281.

[2] See Drinkwater *v.* Drinkwater, 4 Mass. R. 354; Wildbridge *v.* Paterson, 15 Mass. R. 148.

[3] Pothier on Oblig. n. 153.

nistered; as that of Courts of Law must often fail, from the want of adequate powers to reach or redress the mischief.[1]

§ 378. There are other cases of Constructive Frauds against creditors, which the wholesome moral justice of the law has equally discredited and denounced. We refer to that not unfrequent class of cases, in which, upon the failure or insolvency of their debtors, some creditors have, by secret compositions, obtained undue advantages; and thus decoyed other innocent and unsuspecting creditors into signing deeds of composition, which they supposed to be founded upon the basis of entire equality and reciprocity among all the creditors; when, in fact, there was a designed or actual imposition upon all but the favored few. The purport of a composition or trust deed, in cases of insolvency, usually is, that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors, according to the order and terms prescribed in the deed itself. And, in consideration of the assignment, the creditors, who become parties, generally agree to release all their debts, beyond what the funds will satisfy. Now, it is obvious, that in all transactions of this sort, the utmost good faith is required; and the very circumstance that other creditors, of known reputation and standing, have already become parties to the deed, will operate as a strong inducement to others to act in the same way. But, if the signatures of such prior creditors have been procured by secret arrangements with them, more

[1] Jeremy on Equity Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 408, 409; Id. ch. 4; 1 Fonbl. Eq. B. 1, ch. 4, § 12, and note (c); Id. § 14, notes (i) and (k); 1 Eq. Abridg. 149, E. 6; White v. Hussey, Preced. Ch. 14.

favorable to them than the general terms of the composition deed warrant, those creditors really act, as has been said by a very significant, although a homely figure, as decoy ducks upon the rest. They hold out false colors to draw in others, to their loss or ruin.

§ 379. In modern times, the doctrine has been acted upon in Courts of Law, as it has long been in Courts of Equity, that such secret arrangements are utterly void, and ought not to be enforced, even against the assenting debtor, or his sureties, or his friends.[1] There is great wisdom, and deep policy, in the doctrine; and it is found in the best of all protective policy, that which acts by way of precaution, rather than by mere remedial justice; for it has a strong tendency to suppress all frauds upon the general creditors, by making the cunning contrivers the victims of their own illicit and clandestine agreements. The relief is granted, not for the sake of the debtor, for no deceit or oppression may have been practised upon him; but for the sake of honest, and humane, and unsuspecting creditors. And, hence, the relief is granted equally, whether the debtor has been induced to agree to the secret bargain by the threats or oppression of the favored creditors, or whether he has been a mere volunteer, offering his services, and aiding in the intended deception. Such secret bargains are not only deemed incapable of being enforced or confirmed, but even money paid under them is recoverable back, as it has been obtained

1 Chesterfield *v.* Janssen, 1 Atk. 352; 1 Ves. 155, 156; 3 P. Will. 131, Cox's note; Spurrett *v.* Spiller, 1 Atk. 105; Jackman *v.* Mitchell, 13 Ves. 581; Smith *v.* Bromley, Doug. 696, note; Jones *v.* Barkley, Id. 695, note; Cockshott *v.* Bennett, 2 T. Rep. 763; Jackson *v.* Lomas, 4 T. R. 166; Fawcett *v.* Gee, 4 Anst. 910.

against the clear principles of public policy.[1] And it is wholly immaterial, whether such secret bargains give to the favored creditors a larger sum, or an additional security or advantage, or only misrepresent some important fact; for the effect upon other creditors is precisely the same in each of these cases. They are misled into an act, to which they might not, otherwise, have assented.[2]

§ 380. For the like reasons, any agreement, made by an insolvent debtor with his assignee, by which the estate of the insolvent is to be held in trust by the assignee, to secure certain benefits for himself and his

[1] Smith *v.* Bromley, Doug. R. 696, note; Jones *v.* Barkley, Id. 695, note; Jackman *v.* Mitchell, 13 Ves. 581; Ex parte Sadler and Jackson, 15 Ves. 55; Mawson *v.* Stork, 6 Ves. 300; Yeomans *v.* Chatterton, 9 Johns. R. 294; Wiggin *v.* Bush, 12 Johns. R. 306.

[2] Ibid; Eastabrook *v.* Scott, 3 Ves. 456; Constantine *v.* Blache, 1 Cox, 287; 1 Fonbl. Eq. B. 1, ch. 4, § 11, note (*x*); Cullingworth *v.* Lloyd, 2 Beav. R. 385, and the learned note of the Reporter, p. 390; Leicester *v.* Rose, 1 East, R. 372. In Cullingworth *v.* Lloyd, Lord Langdale said: "It must be observed that Edmund Grundy was winding up the business under a power of attorney, which enabled him to pay the debts by an equal pound rate; but it does not appear, that there was any general meeting of the creditors, or any agreement entered into by the creditors generally. The advertisements, however, show a proposition to the creditors at large to pay them all a composition on certain terms; and although every creditor was at liberty to refuse the composition, it is established by a series of decisions, that a creditor cannot ostensibly accept such composition and sign the deed, which expresses his acceptance of the terms, and at the same time stipulate for, or secure to himself a peculiar and separate advantage, which is not expressed upon the deed; and in the case of Leicester *v.* Rose, (4 East, R. 372,) it is stated by Mr. Justice Le Blanc, that in the consideration of cases of this nature, it is not material whether the agreement be entered into at a meeting of all the creditors assembled for the purpose, or impliedly by their affixing their signatures to the same deed, carried round or produced to each separately, and signed by them; those, who by executing the deed, hold out that they come in under the general agreement, are not permitted to stipulate for a further partial benefit to themselves."

family, such as to pay certain annuities to himself and his wife, out of the rents or proceeds of the property assigned, and to apply the surplus to the extinction of a debt due to the assignee, will be held void, and will be rescinded, upon the ground of public policy, whenever it comes before a Court of Equity, even though the suit happen to be at the instance of the insolvent himself. For it is a contrivance in fraud of creditors, to which the assignee, who is, or ought to be, a trustee for them, is a party.[1]

§ 381. In concluding this discussion, so far as it regards creditors, it is proper to be remarked, that although voluntary and other conveyances, in fraud of creditors, are thus declared to be utterly void; yet, they are so far only as the original parties and their privies, and others claiming under them, who have notice of the fraud, are concerned. For *bona fide* purchasers for a valuable consideration, without notice of the fraudulent or voluntary grant, are of such high consideration, that they will be protected, as well at law as in Equity, in their purchases.[2] It would be plainly inequitable, that a party who has, *bona fide*, paid his money upon the faith of a good title, should be defeated by any creditor of the original grantor, who has no superior equity, since it would be impossible for him to guard himself against such latent frauds. The policy of the law, therefore, which favors the security of titles, as conducive to the public good, would be subverted, if a creditor, having no lien upon the property, should yet be permitted to avail himself of the priority of his debt, to defeat such a *bona fide* purchaser. Where the parties

[1] McNeil *v.* Cahill, 2 Bligh, R. 228, Old Series.

[2] Ante, § 64 *c*, 108, 139, 165; Post, § 409, 434, 436.

are equally meritorious, and equally innocent, the known maxim of Courts of Equity is, *Qui prior est in tempore, potior est in jure;* he is to be preferred, who has acquired the first title.[1] This point, however, will naturally present itself in other aspects, when we come to the consideration of the general protection, afforded by Courts of Equity, to purchasers standing in such a predicament.

§ 382. Other underhand agreements, which operate as a fraud upon third persons, may easily be suggested, to which the same remedial justice has been applied. Thus, where a father, upon the marriage of his daughter, entered into a covenant, that upon his death he would leave her certain tenements, and that he would, also by his will, give and leave her a full and equal share, with her brother and sister, of all his personal estate; and he afterwards, during his life, transferred to his son a very large portion of his personal property, consisting of public stock, but retained the dividends for his life; it was held, that the transfer was void, as a fraud upon the marriage articles; and the son was compelled to account for the same.[2] Covenants of this nature are proper in themselves, and ought to be honorably observed. They ought not to be, and indeed are not, construed to prohibit the father from making, during

[1] See Dame Burg's case, Moore, R. 602; Woodcock's case, 33, H. 6, 14; Predgers *v.* Langham, 1 Sid. R. 133; Wilson and Wormal's case, Godbolt, R. 161; Bean *v.* Smith, 1 Mason, R. 272 to 282; Anderson *v.* Roberts, 18 Johns. R. 513; Fletcher *v.* Peck, 6 Cranch, 133, 134; Daubeney *v.* Cockburn, 1 Meriv. 638, 639; Ledyard *v.* Butler, 9 Paige, R. 132.

[2] Jones *v.* Martin, 3 Anst. R. 882; S. C. 5 Ves. 265. See, also, Randall *v.* Willis, 5 Ves. 261; 8 Brown, Parl. R. 242, by Tomlins; McNiel *v.* Cahill, 2 Bligh, R. 228. See Stocker *v.* Stocker, 4 Mylne & Craig, R. 95.

his lifetime, any dispositions of his personal property among children, more favorable to one than another. But they do prohibit him from doing any acts which are designed to defeat and defraud the covenant. He may, if he pleases, make a gift *bona fide* to a child; but then it must be an absolute and unqualified gift, which surrenders all his own interest, and not a mere reversionary gift, which saves the income to himself during his own life

§ 383. So, if a friend should advance money to purchase goods for another, or to relieve another from the pressure of his necessities, and the other parties interested should enter into a private agreement over and beyond that with which the friend is made acquainted; such an agreement will be void at law, as well as in Equity; for the friend is drawn in to make the advance by false colors held out to him, and under a supposition that he is acquainted with all the facts.[2] So the guaranty of the payment of a debt, procured from a friend upon the suppression by the parties of material circumstances, is a virtual fraud upon him, and avoids the contract.[3]

§ 384. Another class of constructive Frauds of a large extent, and over which Courts of Equity exercise an exclusive and very salutary jurisdiction, consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract, injurious to his own rights or interests.[4] This subject has been partly treated before;

[1] Ibid.

[2] Jackson *v.* Duchaise, 3 T. R. 551.

[3] Pidcock *v.* Bishop, 3 B. & Cressw. 605; Smith *v.* Bank of Scotland, 1 Dow, Parl. R. 272. See Owen *v.* Homan, 3 Eng. Law & Eq. R. 121; Squire *v.* Whitton, 1 House of Lords Cases, 333; Ante, § 215.

[4] Com. Dig. Chancery, 4 W. 28; Bean *v.* Smith, 2 Mason, R. 285, 286; 1 Madd. Ch. Pr. 256, 257; Ante, § 191, &c.

but it should be again brought under our notice in this connection.[1] No man can reasonably doubt, that if a party, by the wilful suggestion of a falsehood, is the cause of prejudice to another, who has a right to a full and correct representation of the fact, his claim ought in conscience to be postponed to that of the person whose confidence was induced by his representation. And there can be no real difference between an express representation, and one that is naturally or necessarily implied from the circumstances.[2] The wholesome maxim of the law upon this subject is, that a party who enables another to commit a fraud, is answerable for the consequences;[3] and, the maxim so often cited, *Fraus est celare fraudem*, is, with proper limitations in its application, a rule of general justice.

§ 385. In many cases, a man may innocently be silent; for, as has often been observed, *Aliud est tacere, aliud celare.* But, in other cases, a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction.[4] Thus, if a man, having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former, so standing by, and being silent, will be bound by the sale, and

[1] Ante, § 192 to 204.

[2] 1 Fonbl. Eq. B. 1, ch. 3, § 4, notes (*m*) and (*n*); Sugden on Vendors, ch. 16.

[3] Bac. Max. 16.

[4] 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (*m*) and (*n*); Savage *v.* Foster, 9 Madd. R. 35; Com. Dig. Chancery, 4 I. 3, 4 W. 28; Hanning *v.* Ferrers, 1 Eq. Abridg. 356, pl. 10; Ante, § 204 to 220.

neither he nor his privies will be at liberty to dispute the validity of the purchase.[1] So, if a man should stand by, and see another person, as grantor, execute a deed of conveyance of land belonging to himself, and, knowing the facts, should sign his name as a witness, he would in Equity be bound by the conveyance.[2] So, if a party having a title to an estate, should stand by, and allow an innocent purchaser to expend money upon the estate, without giving him notice, he would not be permitted by a Court of Equity to assert that title against such purchaser, at least not without fully indemnifying him for all his expenditures.[3] The same

[1] Ibid.; Storrs *v.* Barker, 6 Johns. Ch. R. 166, 169 to 172; Wendell *v.* Van Rensselaer, 1 Johns. Ch. R. 354. Courts of Law now act upon the same enlightened principles in regard to personal property, in the transfer of which no technical formalities usually intervene to prevent the application of them. Thus, where it appeared that certain goods of the plaintiff were seized on an execution against a third person (in whose possession they were,) and sold to the defendant, and the plaintiff made no objection to the sale, though he had full notice of it; it was held, that the facts ought to be left to the jury to consider, whether he had not assented to the sale, and ceased to be the owner of the property. On this occasion, Lord Denman, in delivering the opinion of the Court, said, "The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time; and the plaintiff might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence. And we think his conduct, in standing by and giving a sort of sanction to the proceedings under the execution, was a fact of such a nature, that the opinion of the jury ought, in conformity to Heane *v.* Rogers, (9 B. Cressw. 586,) and Graves *v.* Key, (3 Barn. & Adol. 318, note *a*,) to have been taken, whether he had not in point of fact ceased to be the owner." Pickard *v.* Sears, 6 Adolph. & Ellis, R. 474.

[2] Teasdale *v.* Teasdale, Sel. Cas. Ch. 59; 1 Fonbl. Eq. B. 5, ch. 3, § 4, note (*m*).

[3] See Cawdor *v.* Lewis, 1 Younge & Coll. 427; The Chautauque County Bank *v.* White, 6 Barbour, S. C. R. 590; Post, § 388.

rule has been applied both at law and in Equity, where the owner of chattels, with a full knowledge of his own title, has permitted another person to deal with these chattels as his own, in his transactions with third persons, who have bargained and acted in the confidence that the chattels were the property of the person with whom they dealt; for, in cases where one of two innocent persons must suffer a loss, and *à fortiori*, in cases where one has misled the other, he, who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it.[1] Indeed, cases of this sort are viewed with so much disfavor by Courts of Equity, that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation; for neither infants nor *femes covert* are privileged to practise deception or cheats on other innocent persons.[2]

§ 386. In order, however, to justify the application of this cogent moral principle, it is indispensable that the party so standing by and concealing his rights should be fully apprised of them, and should, by his conduct or gross negligence, encourage or influence the purchase; for if he is wholly ignorant of his rights, or the purchaser knows them; or, if his acts, or silence, or negligence, do not mislead, or in any manner affect the transaction, there can be no just inference of actual or constructive fraud on his part.[3] [For a right can be

[1] Nicholson *v.* Hooper, 4 Mylne & Craig, R. 179; Pickard *v.* Sears, 6 Adolph. & Ellis, 474, supra.

[2] 1 Fonbl. Eq. B. 1, ch. 3, § 4; Savage *v.* Foster, 9 Mod. R. 35; Evroy *v.* Nichols, 2 Eq. Abridg. 489; Clare *v.* Earl of Bedford, cited 2 Vern. 150, 151; Becket *v.* Cordley, 1 Bro. Ch. R. 357; Sugden on Vendors, ch. 16, p. 262, 9th edit.; Post, § 387 to 390. See Bright *v.* Boyd, 1 Story, Cir. R. 478.

[3] See 2 Hovend. on Frauds, ch. 22, p. 184.

lost or forfeited only by such conduct as would make it fraudulent and against conscience to assert it.[1]]

§ 387. There are, indeed, cases, where even ignorance of title will not excuse a party; for, if he actually misleads the purchaser by his own representations, although innocently, the maxim is justly applied to him, that, where one of two innocent persons must suffer, he shall suffer, who, by his own acts, occasioned the confidence and the loss.[2] Thus, where a tenant in tail, under a settlement, encouraged a stranger to purchase an annuity, charged on the land by his father's will, from a younger brother, and said, that he believed his brother had a good title; he was compelled to make good the annuity, notwithstanding his ignorance of his own title under the settlement, and of the annuity's being invalid; for, under the circumstances of the case, there was negligence on his part in not instituting proper inquiries, he having heard that there had been a settlement.[3] So, where a mother, who was a tenant in tail, and absolute owner of a term of years, was present at a treaty for her son's marriage, and heard her son declare that the term was to come to him after the death of the mother; and she became a witness to a deed, whereby the son took upon himself to settle the reversion of the term, expectant on his mother's death, upon the issue of the marriage; and the mother did not insist upon more than a life estate therein; she

[1] Devereux *v.* Bengwyn, 5 Iredell, Eq. R. 351.

[2] See Neville *v.* Wilkinson, 1 Bro. Ch. R. 546; 3 P. Will. 74, Mr. Cox's note; Scott *v.* Scott, 1 Cox, R. 378, 379, 380; Evans *v.* Bicknell, 6 Ves. 173, 182, 183, 184; Pearson *v.* Morgan, 2 Bro. Ch. R. 388; Com. Dig. Chancery, 4 W. 28.

[3] Hobbs *v.* Norton, 1 Vern. R. 136; 1 Eq. Abridg. 356, Pl. 8.

was held bound to make good the title, notwithstanding it was insisted that she was ignorant, that, as tenant in tail, she had an absolute power to dispose of it.[1]

§ 388. Another case, illustrative of the same doctrine, may be put, arising from the expenditure of money upon another man's estate, through inadvertence, or a mistake of title.[2] As, for instance, if a man, supposing he has an absolute title to an estate, should build upon the land, with the knowledge of the real owner, who should stand by and suffer the erections to proceed, without giving any notice of his own claim; he would not be permitted to avail himself of such improvements, without paying a full compensation therefor; for, in conscience, he was bound to disclose the defect of title to the builder.[3] Nay, a Court of Equity might, under circumstances, go further, and oblige the real owner to permit the person, making such improvements on the ground, to enjoy it quietly, and without disturbance.[4]

[1] Hudson *v.* Cheyney, 2 Vern. R. 150; Storrs *v.* Barker, 6 Johns. Ch. R. 166, 168, 173, 174. See also Beverly *v.* Beverly, 2 Vern. 133; Redman *v.* Redman, 1 Vern. 347; Scott *v.* Scott, 1 Cox, R. 366, 378; Raw *v.* Potts, 2 Vern. 239; Savage *v.* Foster, 9 Mod. 35; 1 Madd. Ch. Pr. 210, 211; Bac. Abridg. I, *Fraud*, B.; Raw *v.* Potts, Prec. Ch. 35; Brinckerhoff *v.* Lansing, 4 Johns. Ch. R. 65, 70.

[2] Com. Dig. Chancery, 4, I. 3; Ante, § 385; Post, § 799 *a*, 799 *b*, 1237, 1228, 1239.

[3] Pillage *v.* Armitage, 12 Ves. 84, 85. See Wells *v.* Banister, 4 Mass. R. 514; Bright *v.* Boyd, 1 Story, Cir. R. 478.

[4] East India Company *v.* Vincent, 2 Atk. 83; Davor *v.* Spurrier, 7 Ves. 231, 235; Jackson *v.* Cator, 5 Ves. 688; Storrs *v.* Barker, 6 Johns. Ch. R. 168, 169; Shannon *v.* Bradstreet, 1 Sch. & Lefr 73. — The Civil Law carried its doctrine, in cases of this sort, much further; for, in all cases where improvements were *bonâ fide* made upon any estate, by a purchaser or other person, innocently, and under a belief that he was the true owner of the estate, he was entitled to a compensation for the bene-

§ 389. And, upon the like principle, if a person, having a conveyance of land, keeps it secret for several years, and knowingly suffers third persons afterwards to purchase parts of the same premises from his grantor, who remains in possession, and is the reputed owner, and to expend money on the land, without notice of his claim, he will not be permitted afterwards to assert his legal title against such innocent and *bona fide* purchasers. To allow him to assert his title under such circumstances, would be to countenance fraud and injustice; and the conscience of the party is bound by an equitable estoppel; for in such a case, it is emphatically true; *Qui tacet, consentire videtur; qui potest et debet vetare, jubet, si non vetat.*[1]

§ 390. A more common case, illustrative of the same doctrine, is, where a person, having an incumbrance or security upon an estate, suffers the owner to procure additional money upon the estate by way of lien or mortgage, concealing his prior incumbrance or security. In such a case he will be postponed to the second encumbrancer; for it would be inequitable to allow him to profit by his own wrong in concealing his claim, and thus lending encouragement to the new loan.[2] Thus, if a prior mortgagee, who knows that

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fit actually conferred upon the estate. See Bright *v.* Boyd, 1 Story, Cir. R. 478, 494, 495, 496; Post, § 799 *a*, 799 *b*, 1237, 1238, 1239.

1 Wendell *v.* Van Rensselaer, 1 Johns. Ch. R. 354; 2 Inst. 146, 305; Branch's Max. 181, 185; Hanning *v.* Ferrers, 1 Eq. Abridg. 357; Storrs *v.* Barker, 6 Johns. Ch. R. 166, 168; Bright *v.* Boyd, 1 Story, Cir. R. 478; Ante, 385.

2 Draper *v.* Borlau, 2 Vern. 370; Clare *v.* Earl of Bedford, cited 2 Vern. R. 150, 151; Mocatta *v.* Murgatroyd, 1 P. Will. 393, 394; Berisford *v.* Milward, 2 Atk. 49; Becket *v.* Cordley, 1 Bro. Ch. R. 353, 357; Evans *v.* Bicknell, 6 Ves. 173, 182, 183; Pearson *v.* Morgan,

another person is about to lend money on the mortgaged property, should deny that he had a mortgage, or should assert that it was satisfied, he would be postponed to the second mortgagee, who should lend his money on the fault of the representations so made.[1] So, if a prior mortgagee, whose mortgage is not registered, should be a witness to a subsequent mortgage or conveyance of the same property, knowing the contents of the deed, and should not disclose his prior encumbrance, he would be postponed or barred of his title.[2] Such transactions may well explain the maxim, *Fraus est celare fraudem.*

§ 391. In all this class of cases, the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet Courts of Equity will not grant relief.[3] It has, accordingly, been laid down by a very learned Judge, that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud.[4] And, if the intention be fraudulent, although not exactly pointing to the object accom-

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2 Bro. Ch. R. 385, 388; Plumb *v.* Fluitt, 2 Anst. R. 432; 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*u*); Sugden on Vendors, ch. 16; Lee *v.* Munroe, 7 Cranch, 368.

[1] Lee *v.* Munroe, 7 Cranch, 366, 368.

[2] Brinckerhoff *v.* Lansing, 4 Johns. Ch. R. 65.

[3] Tourle *v.* Rand, 2 Bro. Ch. R. 652; 1 Madd. Ch. Pr. 256, 257.

[4] Evans *v.* Bicknell, 6 Ves. 190, 191, 192; Merewether *v.* Shaw, 2 Cox, R. 124; See Hewitt *v.* Loosemore, 9 Eng. Law & Eq. R. 35; Sugden on Vendors, ch. 16, p. 262, &c., (9th edit.)

plished; yet the party will be bound to the same extent as if it had been exactly so pointed.[1]

§ 392. Upon the same principles, if a trustee should permit the title deeds of the estate to go out of his possession for the purpose of fraud; and, intending to defraud one person, he should defraud another, Courts of Equity will grant relief against him.[2] So, if a bond should be given upon an intended marriage, and to aid it; and the marriage with that person should afterwards go off, and another marriage should take place upon the credit of that bond; the bond would bind the party in the same way as it would if the original marriage had taken effect.[3]

§ 393. What circumstances will amount to undue concealment, or to misrepresentation, in cases of this sort, is a point more fit for a treatise of evidence, than for one of mere jurisdiction. But it has been held, that a first mortgagee's merely allowing the mortgagor to have the title deeds, or a first mortgagee's witnessing a second mortgage deed, but not knowing the contents, or even concealing from a second mortgagee information of a prior mortgage, when he made application therefor, the intention of the party applying to lend money not being made known, are not of themselves sufficient to affect the first mortgagee with constructive fraud.[4] There must be other ingredients to

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1 Evans *v.* Bicknell, 6 Ves. 191, 192; Beckett *v.* Cordley, 1 Bro. Ch. R. 357; 1 Fonbl. Eq. B. 1, ch. 3, § 4; Plumb *v.* Fluitt, 2 Anst. 432, 440.

2 Evans *v.* Bicknell, 6 Ves. 174, 191; Clifford *v.* Brooke, 12 Ves. 132.

3 See Evans *v.* Bicknell, 6 Ves. 191.

4 Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, p. 193, 194, 195; 1 Madd. Ch. Pr. 429 to 431; Id. 256; Plumb. *v.* Fluitt, 2 Anst. R. 432; Breknell *v.* Evans, 6 Ves. R. 174; Cothay *v.* Sydenham, 2 Bro. Ch. R. 391;

give color and body to these circumstances; for they may be compatible with entire innocence of intention and object.[1] Nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee, in the mortgagor's retaining the title deeds, is now deemed a sufficient reason for postponing his priority. And, in regard to the other acts above stated, they must be done under circumstances which show

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West *v.* Reid, 2 Hare, R. 249, 259. In this last case Mr. Vice-Chancellor Wigram said: "In short, let the doctrine of constructive notice be extended to all cases, (it is, in fact, more confined in Plumb *v.* Fluitt, Brecknell *v.* Evans, Cothay *v.* Sydenham, and other cases,) but let it be extended to all cases in which the purchaser has notice, that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limits which that statement of the rule imposes, —once admit that a purchaser is to be affected with constructive notice of the contents of instruments not necessary to, nor presumptively connected with the title, only because by possibility they *may* affect it (for that may be predicated of almost any instrument; and it is impossible, in sound reasoning, to stop short of the conclusion, that every purchaser is affected with constructive notice of the contents of every instrument, of the mere existence of which he has notice, — a purchaser must be presumed to investigate the title of the property he purchases, and may, therefore, be presumed to have examined every instrument forming a link, directly or by inference, in that title; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly nor presumptively connected with the title, because they *may* by possibility affect it." See Jackson *v.* Rowe, 2 Sim. & Stu. 472; Hodgson *v.* Dean, 2 Sim. & Stu. 221; Hewitt *v.* Loosemore, 9 Eng. Law & Eq. R. 35; and see, also, Jones *v.* Smith (per Lord Chancellor on appeal,) Turn. & Phil. R. (not published.)

[1] See 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (*m*) and (*n*); Evans *v.* Bicknell, 6 Ves. 172, 182, 190, 191, 192; Ibbotson *v.* Rhodes, 2 Vern. R. 554; Plumb *v.* Fluitt, 2 Anst. R. 432; Hewitt *v.* Loosemore, 9 Eng. Law & Eq. R. 35; Barrett *v.* Weston, 12 Ves. 133; Berry *v.* Mutual Ins. Co. 2 Johns. Ch. R. 603, 608; Tourle *v.* Rand, 2 Bro. Ch. R. 650, and Mr. Belt's note; Peter *v.* Russell, 2 Vern. 726, and Mr. Raithby's note (1).

a like concurrence and coöperation in some deceit upon the second mortgagee.[1]

§ 394. It is curious to trace how nearly the Roman Law approaches that of England on this subject; thus demonstrating that if they had not a common origin, at least, each is derived from that strong sense of justice which must pervade all enlightened communities. It is an acknowledged principle of the Roman jurisprudence, that a creditor who consents to the sale, donation, or other alienation of the property of his debtor, which is pledged or mortgaged for his debt, cannot assert his title against the purchaser, unless he reserves it; for his loss of title cannot, under such circumstances, be asserted to be to his prejudice; since it is by his consent; and otherwise the purchaser would be deceived into the bargain. *Creditor, qui permittit rem venire, pignus dimittit.*[2] *Si consensit venditioni creditor, liberatur hypotheca.*[3] *Si in venditione pignoris consenserit creditor, vel ut debitor hanc rem permutet, vel donet, vel in dotem det; dicendum erit, pignus liberari, nisi salvâ causâ pignoris sui consensit, vel venditioni, vel cæteris.*[4] But as to what shall be deemed a consent, the Roman Law is very guarded. For it is there said, that we are not to take for a consent of the creditor to an alienation of the pledge, the knowledge which he may have of it; nor the silence which he may keep after he knows it; as, if he knows, that his debtor is about selling a house, which is mortgaged to him, and

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[1] 1 Fonbl. Eq. B. 1, ch. 3, § 4, note (*n*); Peter *v.* Russell, 2 Vern. 726, and Mr. Raithby's note (1); 1 Madd. Ch. Pr. 256, 257.

[2] Dig. Lib. 50, tit. 17, l. 158.

[3] Dig. Lib. 20, tit. 6, l. 7; Pothier, Pand. Lib. 20, tit. 6, art. 2, n. 21.

[4] Dig. Lib. 20, l. 4, § 1.

he says nothing about it. But, in order to deprive him of his right, it is necessary that it should appear by some act that he knows what is doing to his prejudice, and consents to it; or, that there is some ground to charge him with dishonesty for not having declared his right when he was under an obligation to do it, by which the purchaser was misled. Thus, if, upon the alienation, the debtor declares that the property is not encumbered, and the creditor knowingly signs the contract, as a party or witness, thereby rendering himself an accomplice in the false affirmation, he will be bound by the alienation. But the mere signature of the creditor, as a witness, to a contract of alienation will not of itself bind him, unless there are circumstances to show that he knew the contents, and acted disingenuously and dishonestly by the purchaser.[1] *Non videtur consensisse creditor, si, sciente eo, debitor rem vendiderit, cum ideo passus est venire, quod sciebat, ubique pignus sibi durare. Sed si subscripserit forte in tabulis emptionis, consensisse videtur, nisi manifeste appareat deceptum esse.*[2]

§ 395. Another class of Constructive Frauds consists of those where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims; but his own title will be postponed, and made subservient to theirs.[3] It would be gross injustice to allow him to

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[1] Domat, B. 3, tit. 1, § 7, art. 15, and Strahan's note.

[2] Dig. Lib. 20, tit. 6, l. 8, § 15; Pothier, Pand. Lib. 20, tit. 6, art. 2, n. 26, 27.

[3] Com. Dig. Chancery, 4 O. 1; Sugden on Vendors, ch. 16, § 5, 10; ch. 17, § 1, 2. — An admitted exception (which is more fully adverted to in a subsequent note) is the case of a dowress. A person, purchasing

defeat the just rights of others by his own iniquitous bargain. He becomes, by such conduct, *particeps criminis* with the fraudulent grantor; and the rule of Equity, as well as of law, is, *Dolus et fraus nemini patrocinari debent.*[1] And in all such cases of purchases with notice, Courts of Equity will hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat.[2] Thus, if title deeds should be deposited as a security for money, (which would operate as an equitable mortgage,) and a creditor, knowing the facts, should subsequently take a mortgage of the same property; he would be postponed to the equitable mortgage of the prior creditor; and the notice would raise a trust in him to the amount of such equitable mortgage.[3] So, if a mortgagee, with notice of a trust, should get a conveyance from the trustee, in order to protect his mortgage, he would not be allowed to derive any benefit from it; but he would be held to be subject to the original trust, in the same manner as the trustee. For it has been significantly said, that, although a purchaser may buy an encumbrance, or lay hold on any plank to protect himself, yet he shall not protect him-

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with a notice of her title, may yet, by getting in a prior legal title or term, protect himself against her title. This is an anomaly, but it is now so firmly established that it cannot be shaken. See Swannock *v.* Lefford, Ambler, R. 6, and Mr. Blunt's note, and the note of Lord Hardwicke's judgment in Co. Litt. 208 a; Radnor *v.* Vanderberdy, Show. Parl. Cas. 69; Maundrell *v.* Maundrell, 10 Ves. 271, 272; Winn *v.* Williams, 5 Ves. 130; Male *v.* Smith, Jacob, R. 497; Ante, § 57 a; Post, § 410, note.

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 3; 3 Co. R. 78.

[2] Ibid.; 1 Fonbl. Eq. B. 2, ch. 6, § 2; Murray *v.* Ballou, 1 Johns. Ch. R. 466; Murray *v.* Finster, 2 Johns. Ch. R. 158; Maundrell *v.* Maundrell, 10 Ves. 260, 261, 270.

[3] Birch *v.* Ellames, 2 Anst. 427; Plumb *v.* Fluitt, 2 Anst. R. 433.

self by the taking of a conveyance from a trustee, with notice of the trust; for he thereby becomes a trustee; and he must not, to get a plank to save himself, be guilty of a breach of trust.[1]

§ 396. The same principle applies to cases of a contract to sell lands, or to grant leases thereof. If a subsequent purchaser has notice of the contract, he is liable to the same Equity, and stands in the same place, and is bound to do the same acts, which the person who contracted, and whom he represents, would be bound to do.[2]

§ 397. It is upon the same ground, that, in countries where the registration of conveyances is required, in order to make them perfect titles against subsequent purchasers, if a subsequent purchaser has notice, at the time of his purchase, of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that prior conveyance.[3] This has been long the settled doctrine in Courts of Equity; and it is often applied in America, although not in England, in Courts of Law, as a just exposition of the

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[1] Saunders *v.* Dehaw, 2 Vern. R. 271; 2 Fonbl. Eq. B. 2, ch. 6, § 2; Post, § 413, 414, 421. See also Foster *v.* Blackstone, 1 Mylne & Keen, 297; Tinson *v.* Ramsbottom, 2 Keen, R. 35.

[2] Taylor *v.* Stibbert, 2 Ves. jr. 438; Davis *v.* Earl of Strathmore, 16 Ves. 419, 428, 429; Underwood *v.* Courtown, 2 Sch. & Lefr. 61; Macreath *v.* Symmons, 15 Ves. 350; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 2, p. 192, &c.; Com. Dig. Chancery, 4 C. 1.

[3] Sugden on Vendors, ch. 16, § 5, 10; ch 17, § 1, 2; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*h*): 1 Madd. Ch. Pr. 260; Bushnell *v.* Bushnell, 1 Sch. & Lefr. 99 to 103; Eyre *v.* Dolphin, 2 B. & Beatt. 302; Blades *v.* Blades, 1 Eq. Abridg. 358; Worseley *v.* De Matto, 1 Burr. 474, 475; Forbes *v.* Dennister, 1 Bro. Par. Cas. 425; Sheldon *v.* Coxe, 2 Eden, R. 224; Le Neve *v.* Le Neve, 3 Atk. 646; S. C. 1 Ves. 64; Amb. R. 436; 2 White *v.* Tudor's Eq. Lead. Cas. 21, and notes; Drew *v.* Lord Norbury, 9 Irish Eq. R. 171; Chandos *v.* Brownlow, 2 Ridg. Parl. R. 428;

Registry Acts.[1] The object of all Acts of this sort is, to secure subsequent purchasers and mortgagees against prior secret conveyances and encumbrances. But where such purchasers and mortgagees have notice of any prior conveyance, it is impossible to hold that it is a secret conveyance, by which they are prejudiced. On the other hand, the neglect to register a prior conveyance is often a matter of mistake, or of overweening confidence in the grantor; and it would be a manifest fraud, to allow him to avail himself of the power, by any connivance with others, to defeat such prior conveyance.[2] The ground of the doctrine is (as Lord Hardwicke has remarked) plainly this: "That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate; and, after knowing that, he takes away the right of another person, by getting the legal title.[3] And this exactly agrees with the definition of the Civil Law of *dolus malus*."[4] "Now, if a

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Bean *v.* Smith, 2 Mason, R. 285; Coppinger *v.* Fernyhough, 2 Bro. Ch. R. 291; Sugden on Vendors, ch. 16.

[1] Doe d. Robinson *v.* Alsop, 5 B. & Ald. 142; Norcross *v.* Widgery, 2 Mass. R. 506; Bigelow's Dig. *Conveyance*, P. and note; Jackson *v.* Sharp, 9 Johns. R. 163; Jackson *v.* Burgott, 10 Johns. R. 457; Jackson *v.* West, 10 Johns. R. 466; Johnson's Dig. *Deed*, VIII.; Farnsworth *v.* Childs, 4 Mass. R. 637. See, as to the Registry Acts, 4 Kent, Comm. Lect. 58, p. 168 to 194, 4th edit.

[2] Le Neve *v.* Le Neve, 3 Atk. 646; 1 Ves. 64; Ambler, 436, and Blunt's note, ibid; Belt's Suppl. 50; Bushnell *v.* Bushnell, 1 Sch. & Lefr. 98, 99, 100, 101, 102; Eyre *v.* Dolphin, 2 Ball & Beatt. 299, 300, 302; 1 Madd. Ch. Pr. 260, 261; Toulman *v.* Steere, 3 Meriv. R. 209, 224.

[3] Le Neve *v.* Le Neve, 3 Atk. 646, and cases before cited.

[4] Dig. Lib. 4, tit. 3, l. 2; Id. Lib. 2, tit. 14, § 9.

person does not stop his hand, but gets the legal estate, when he knows the Equity was in another, *machinatur ad circumveniendum.*"[1]

§ 398. This doctrine, as to postponing registered to unregistered conveyances upon the ground of notice, has broken in upon the policy of the Registration Acts in no small degree; for a registered conveyance stands upon a different footing from an ordinary conveyance. It has, indeed, been greatly doubted, whether Courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance. But they have said that fraud shall not be permitted to prevail. There is, however, this qualification upon the doctrine, that it shall be available only in cases, where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance, in prejudice to the known title of the other party.[2]

§ 399. What shall constitute notice, in cases of subsequent purchasers, is a point of some nicety, and resolves itself, sometimes into matter of fact, and sometimes into matter of law.[3] Notice may be either actual

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[1] Dig. Lib. 4, tit. 3, l. 2; Id. Lib. 3, tit. 14, § 9.

[2] Wyatt *v.* Barwell, 19 Ves. 439; Sugden on Vendors, ch. 16, § 5, 10. There are some cases in which notice does not affect a purchaser. Thus, where an estate is limited to such uses as A shall appoint; and a judgment is obtained against him, and he then appoints the estate to B, who has notice of the judgment; B will, notwithstanding the notice, take the estate free from the lien of the judgment; for he takes under the deed of appointment, and of course by a title prior to the judgment. Skeeles *v.* Shearley, 8 Sim. 156, 157; S. C. 3 Mylne & Craig, 112. See, as to the effect of this notice, by an assignee of an equitable interest, to the legal holder of the property, to give priority of right over prior assignees, who have given no notice, Timson *v.* Ramsbottom, 2 Keen, R. 35; Foster *v.* Blackstone, 1 Mylne & Keen, R. 297; Post, § 421 *a*, 1035 *a*.

[3] Com. Dig. Chancery, 4 C. 2. See Day *v.* Dunham, 2 Johns. Ch. R. 190; Jones *v.* Smith, 1 Hare, R. 43; Post, § 1035, 1047, 1057.

and positive; or it may be implied and constructive.[1] Actual notice requires no definition; for in that case knowledge of the fact is brought directly home to the party. Constructive notice is in its nature no more than evidence of notice, the presumption of which is so violent, that the Court will not even allow of its being controverted.[2] [Or, as has been elsewhere defin-

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[1] Sugden on Vendors, ch. 17, § 1, 2. In a treatise like the present, it is impracticable to do more than to glance at topics of this nature. The learned reader will find full information on the subject in treatises which profess to examine it at large. See Sugden on Vendors, ch. 16 and 17, (9th edit.); Newland on Contracts, ch. 36, p. 504 to 516.

[2] Plumb *v.* Fluitt, 2 Anst. R. 438, Per Eyre, C. B.; Kennedy *v.* Green, 3 M. & K. 719; Wilde *v.* Gibson, 1 House of Lords Cases, 605; 4 Kent, Comm. Lect. 58, p. 179, 180 (4th edit.) See also Jones *v.* Smith, 1 Hare, R. 43; Meux *v.* Bell, 1 Hare, R. 73; West *v.* Reid, 2 Hare, 257. In Jones *v.* Smith, 1 Hare, R. 43, Mr. Vice-Chancellor Wigram examined the cases as to constructive notice very largely, and upon that occasion said: "It is, indeed, scarcely possible to declare, *a priori*, what shall be deemed constructive notice, because, unquestionably, that which would not affect one man, may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger assert, that the cases in which constructive notice has been established resolve themselves into two classes: — First, cases in which the party charged has had actual notice, that the property in dispute was, in fact, charged, encumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, encumbrance, or other circumstance affecting the property of which he had actual notice; and secondly, cases in which the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry from the very purpose of avoiding notice. How reluctantly the Court has applied, and within what strict limits it has confined the latter class of cases, I shall presently consider. The proposition of law, upon which the former class of cases proceeds, is not, that the party charged had notice of a fact or instrument, which, in truth, related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which this second class proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding

ed, Constructive notice is knowledge imputed by the Court on presumption, too strong to be rebutted, that the knowledge must have been communicated.[1]]

§ 400. An illustration of this doctrine of constructive notice is where the party has possession or knowledge of a deed, under which he claims his title, and it recites another deed, which shows a title in some other person, there the Court will presume him to have notice of the contents of the latter deed, and will not permit him to introduce evidence to disprove it.[2] And, generally, it may be stated, as a rule on this subject, that where a purchaser cannot make out a title, but by a deed which leads him to another fact, he shall be presumed to have knowledge of that fact.[3] So, the purchaser is, in like manner, supposed to have knowledge of the instrument under which the party with whom he contracts, as executor, or trustee, or appointee,

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knowledge, — a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice, that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts, which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, — then the doctrine of constructive notice will not apply; there the purchaser will in Equity be considered, as in fact he is, a *bonâ fide* purchaser without notice. This is clearly Sir Edward Sugden's opinion (Vend. & Purch. Vol. 3, p. 471, 472, Ed. 10); and with that sanction I have no hesitation in saying it is mine also." Affirmed on appeal, 1 Phillips, 244. See also Gibson *v.* Ingo, 6 Hare, R. 112; Farrow *v.* Rees, 4 Beav. 18; Taylor *v.* Baker, 5 Price, 30; Penny *v.* Watts, 1 Mac. & G. 150.

[1] Hewitt *v.* Loosemore, 9 Eng. Law & Eq. R. 75; Rogers *v.* Jones, 8 New Hamp. 264; Griffith *v.* Griffith, 1 Hoff. Ch. R. 153.

[2] Ibid.; Cuyler *v.* Brandt, 2 Cain. Cas. in Err. 326; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*m*); Eyre *v.* Dolphin, 2 B. & Beatt. 301, 302.

[3] 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); Mertins *v.* Jolliffe, Ambler, R. 311, 314; Marr *v.* Bennett, 2 Ch. Cas. 246; Sugden on Vendors, ch. 16;

derives his power.[1] Indeed, the doctrine is still broader; for, whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons,) is, in Equity, held to be good notice to bind him.[2] Thus, notice of a lease will be notice of its contents.[3] So, if a person should purchase an estate from the owner, knowing it to be in the possession of tenants, he is bound to inquire into the estate[4] which these tenants have, and, therefore, he is affected with notice of all the facts as to their estates.[5]

2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); Com. Dig. Chancery, 4 C. 2. This doctrine, however, is to be received with some qualifications. For if a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards he purchases the other lands, to which an apparent title is made, independent of that deed, the former notice of the deed will not itself affect him in the second transaction; for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about to make, nor to take notice of more of the deed than affected his then purchase. Hamilton *v.* Royal, 2 Sch. & Lefr. 327. In short, he is bound to take notice of those things only in the deed, which affect his present purchase, not any future purchase. Mertins *v.* Jolliffe, Ambler, R. 311.

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*m*); Id. B. 3, ch. 3, § 1, note (*b*); Mead *v.* Lord Orrery, 3 Atk. 238; Drapers' Company *v.* Yardley, 2 Vern. R. 662; Daniel *v.* Kent, 1 Vern. R. 319; Jackson *v.* Nealy, 10 Johns. R. 374; Sugden on Vendors, ch. 17, § 2.

[2] 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); B. 3, ch. 3, § 1, and note (*b*); Smith *v.* Low, 1 Atk. 490; Ferrars *v.* Cherry, 2 Vern. R. 384; Daniels *v.* Davison, 16 Ves. 250; Howarth *v.* Deem, 1 Eden, R. 351, and Mr. Eden's note, ib.; Sterry *v.* Arden, 1 Johns. Ch. R. 267; Surman *v.* Barlow, 2 Eden, R. 167; Parker *v.* Brooke, 9 Ves. 583; Green *v.* Slayter, 4 Johns. Ch. R. 38; Eyre *v.* Dolphin, 2 B. & Beatt. 301, 302; Com. Dig. Chancery, 4 C. 2.

[3] Hall *v.* Smith, 14 Ves. 426.

[4] [See Baynard *v.* Norris, 3 Gill, 468; Dahl *v.* Page, 2 Green, Ch. R. 143.]

[5] Taylor *v.* Stibbert, 2 Ves. jr. 440; Spunner *v.* Walsh, 10 Irish Eq. R.

§ 400 *a*. But, in a great variety of cases, it must necessarily be matter of no inconsiderable doubt and difficulty to decide what circumstances are sufficient to put a party upon inquiry. Vague and indeterminate rumor or suspicion, is quite too loose and inconvenient in practice, to be admitted to be sufficient.[1] But there will be found almost infinite gradations of presumption between such rumor, or suspicion, and that certainty as to facts, which no mind could hesitate to pronounce enough to call for further inquiry, and to put the party upon his diligence. No general rule can, therefore, be laid down to govern such cases. Each must depend upon its own circumstances.[2] There is no case which goes the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a party, as if he were guilty of fraud or wilful neglect,

380; Daniels *v.* Davison, 16 Ves. 249, 252; Smith *v.* Low, 1 Atk. 489; Allen *v.* Anthony, 1 Meriv. R. 262; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note (*m*); Meux *v.* Maltby, 2 Swanst. 281; Chesterman *v.* Gardner, 5 Johns. Ch. R. 29; Hanbury *v.* Litchfield, 2 Mylne & Keen, 629, 632, 633. In this last case, the Master of the Rolls (Sir C. C. Pepys) said, "It is true, that where a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title. But, if, at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenant contained in the original lease, it has never been construed want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenant." See, also, Flagg *v.* Mann, 2 Sumner, R. 486, 554, 555; Blaisdell *v.* Stevens, 16 Vern. R. 179; 17 Id. 329; Westervelt *v.* Huff, 2 Sandf. 98; Hood *v.* Fahnstock, 1 Barr, 470.

[1] Sugden on Vendors, ch. 17; Wildgrove *v.* Wayland, Godb. R. 147; Jolland *v.* Stainbridge, 3 Ves. 478.

[2] See 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); Eyre *v.* Dolphin, 2 B. & Beatt. 301; Hine *v.* Dodd, 2 Atk. 275. See Jones *v.* Smith, The English Jurist, May 27th, 1845, p. 431; Flagg *v.* Mann, 2 Summer, R. 489, 549, 560.

or had positive notice.[1] And, although a mistake of law, upon the construction of a deed or contract, will not alone discharge a purchaser from the legal effects of notice of such deed or contract; yet there may be a case of such doubtful Equity under the circumstances, that it ought not to be enforced against such a purchaser.[2] The mere fact, that the assignees of an insolvent debtor have made a sale of the estate at auction, under circumstances of negligence on their part, will not affect the purchaser with notice, as such circumstances are collateral to the question of title. Even if before he takes the conveyance, he have notice of such circumstances, yet if he have purchased *bonâ fide*, his title is not necessarily voidable. But the question must depend in a great measure upon this, whether the conduct of the assignee be such a gross and palpable breach of duty as ought justly to avoid the sale.[3]

§ 401. How far the registration of a conveyance, in countries where such registration is authorized and required by law, shall operate as constructive notice to subsequent purchasers, by mere presumption of law, independent of any actual notice, has been much discussed both in England and in America. It is not doubted in either country that a prior conveyance, duly registered, operates to give full effect to the legal and equitable estate conveyed thereby, against subsequent conveyances of the same legal and equitable estate.[4] But

[1] Plumb *v.* Fluitt, 2 Anst. R. 433, 440. See Dey *v.* Dunham, 2 Johns. Ch. R. 190, 191; Hewitt *v.* Loosemore, 9 Eng. Law & Eq. R. 35; Worthington *v.* Morgan, 16 Sim. 547.

[2] Cordwill *v.* Mackrill, 2 Eden, R. 341, 348; Parker *v.* Brooke, 9 Ves. 583, 588; 2 Fonbl. Eq. B. 2, ch. 6, § 3, and note; Bovey *v.* Smith, 1 Vern. 144, 149; Walker *v.* Smallwood, Amb. R. 676.

[3] Borrell *v.* Dunn, 2 Hare, R. 450 to 455.

[4] Wrightson *v.* Hudson, 2 Eq. Abr. 609, Pl. 7.

the question becomes important as to other collateral effects, such as defeating the right of tacking of mortgages, and other incidentally accruing equities between the different purchasers. For, if the mere registry, in such cases, without actual knowledge of the conveyance, operates as constructive notice, it shuts out many of those equities which otherwise might have an obligatory priority.[1] It has been truly remarked, that there is a material difference between actual notice, and the operation of the Registry Acts. Actual notice may bind the conscience of the parties; the operation of the Registry Acts may bind their title, but not their conscience.[2]

§ 402. In England, the doctrine seems at length to be settled, that the mere registration of a conveyance shall not be deemed constructive notice to subsequent purchasers, but that actual notice must be brought home to the party, amounting to fraud.[3] The subject certainly is attended with no inconsiderable difficulty. Some learned Judges have expressed a doubt, whether Courts of Equity ought not to have said, that in all cases of a public registry, which is a known depository for conveyances, a subsequent purchaser ought to search, or be bound by notice of the registry, in the same way as he would be by a decree in Equity, or by a judgment at law.[4] Other learned Judges have intimated a differ-

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[1] Newland on Contracts, ch. 36, p. 508.

[2] Underwood *v.* Courtown, 3 Sch. & Lefr. 66. See Latouche *v.* Dunsaney, 1 Sch. & Lefr. 137; Day *v.* Dunham, 2 Johns. Ch. R. 190, 191.

[3] Wyatt *v.* Barwell, 19 Ves. 435; Jolland *v.* Stainbridge, 3 Ves. 477; Com. Dig. Chancery, 4 C. 1.

[4] Morecock *v.* Dickens, Amb. R. 480; Hine *v.* Dodd, 2 Atk. 275; Parkhurst *v.* Alexander, 1 Johns. Ch. R. 399; Sugden on Vend. ch. 16, 17.

ent opinion; assigning as a reason, that if the registration of the conveyance should be held constructive notice, it must be notice of all that is contained in the conveyance; and, then, subsequent purchasers would be bound to inquire after the contents, the inconveniences of which cannot but be deemed exceedingly great.[1] The question seems first to have arisen in a case of the tacking of mortgages, about the year 1730; and it was then decided, by Lord Chancellor King, that the mere registration of a second mortgage did not prevent a prior mortgagor from tacking a third mortgage, when he had no actual notice of the existence of the second mortgage.[2] This decision has ever since been steadily adhered to, perhaps more from its having become a rule of property, than from a sense of its intrinsic propriety.

§ 403. In America, however, the doctrine has been differently settled; and it is uniformly held, that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property.[3] The reasoning upon which this doctrine is founded is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances, to search for prior incumbrances, the means of which search are within his power, and the danger (so forcibly alluded to by Lord Hardwicke) of letting in parol proof

[1] Latouche v. Dunsaney, 1 Sch. & Lefr. 157; Underwood v. Courtown, 2 Schr. & Lefr. 64, 66; Pentland v. Stokes, 2 B. & Beat. 75.

[2] Bedford v. Backhouse, 2 Eq. Abridg. 615, Pl. 12; S. P. Wrightson v. Hudson, 2 Eq. Abridg. 609, Pl. 7; Cator v. Cooly, 1 Cox, R. 182; Wiseman v. Westland, 1 Y. & Jerv. 117.

[3] Parkhurst v. Alexander, 1 Johns. Ch. R. 394; Schutt v. Large, 6 Barb. 373.

notice, or want of notice, of the actual existence of the conveyance.[1] The American doctrine certainly has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only in examining their titles to estates.[2]

§ 404. But this doctrine, as to the registration of deeds, being constructive notice to all subsequent purchasers, is not to be understood of all deeds and conveyances which may be *de facto* registered, but of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered,[3] or the registry itself is not in compliance with the law,[4] the act of registration is treated as a mere nullity; and, then, the subsequent purchaser is affected only by such actual notice, as would amount to a fraud.[5]

§ 405. It is upon similar grounds, that every man is presumed to be attentive to what passes in the Courts of Justice of the state or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable

[1] Hine *v.* Dodd, 2 Atk. 275.

[2] Johnson *v.* Strong, 2 Johns. R. 510; Frost *v.* Beekman, 1 Johns. Ch. R. 288, 299; S. C. 18 Johns. R. 544, Parkhust *v.* Alexander, 1 Johns. Ch. R. 394. — The better opinion also seems to be, that the registration of an equitable mortgage, or title, or incumbrance, is notice to a subsequent purchaser, as much as if it were a legal security or title. Parkhurst *v.* Alexander, 1 Johns. Ch. R. 398, 399, and the cases there cited.

[3] Villard *v.* Roberts, 1 Strobh. Eq. 393; Lewis *v.* Baird, 3 McLean, 56.

[4] Tillman *v.* Cowand, 12 S. & M. 262.

[5] Ibid.; Underwood *v.* Courtown, 2 Sch. & Lefr. 68; Latouche *v.* Dunsaney, 1 Sch. & Lefr. 157; Astor *v.* Wells, 4 Wheat. R. 466; Frost *v.* Beekman, 1 Johns. Ch. R. 300; Lessee of Heister *v.* Fortner, 2 Binn. R. 40; Farmer's Loan Trust Co. *v.* Malby, 8 Paige, R. 361.

consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit.[1]

§ 406. Ordinarily, it is true, that the decree of a Court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit.[2] Where there is a real and fair purchase, without any notice, the rule may operate very hardly.[3] But it is a rule founded upon a great public policy; for, otherwise, alienations made during a suit might defeat its whole purpose, and there would be no end to litigation.[4] And hence arises the maxim, *Pendente lite, nihil innovetur;* the effect of which is not to annul the conveyance; but only to render it subservient to

[1] Com. Dig. Chancery, 4 C. 3 and 4; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*n*); Sorrell *v.* Carpenter, 2 P. Will. 482; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Bishop of Winchester *v.* Paine, 11 Ves. 194; Garth *v.* Ward, 2 Atk. 175; Mead *v.* Lord Orrery, 3 Atk. 242; Gaskeld *v.* Durdin, 2 B. & Beatt. 169; Moore *v.* Macnamara, 2 B. & Beatt. 186; Murray *v.* Ballou, 1 Johns. Ch. R. 566. [See Lewis *v.* Mew, 1 Strobh. Eq. R. 180; Price *v.* White, 1 Bailey's Eq. R. 244, that the pleadings in the suit pending should direct a purchaser's attention to the identity of the property.]

[2] Bishop of Winchester *v.* Paine, 11 Ves. 197; Metcalf *v.* Pulvertoft, 2 V. & Beam. 205.

[3] 2 P. Will. 483; Story on Equity Plead. § 156, 351; 2 Story on Equity Jurisp. § 908.

[4] Co. Litt. 224 *b*; Metcalf *v.* Pulvertoft, 2 V. & Beam. 199; Gaskeld *v.* Durdin, 2 B. & Beatt. 169.

the rights of the parties in the litigation.[1] As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them.[2] *A Lis pendens*, however, being only a general notice of an equity to all the world, it does not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit.[3] If, therefore, the right to relief in Equity depends upon any supposed coöperation in a fraud, it is indispensable to establish an express or direct notice of the fraudulent act. And although, as we have seen, a registered deed will be postponed to a prior unregistered deed, where the second purchaser had actual notice of the first purchase; yet the doctrine has never been carried to the extent of making a *Lis pendens* constructive notice of the prior unregistered deed; but actual notice is required.[4]

§ 407. In general, a decree is not constructive notice to any persons, who are not parties or privies to it; and, therefore, other persons are not presumed to have notice of its contents. But a person, who is not a party to a decree, if he has actual notice of it, will be bound by it; and if he pays money in opposition to it, he will be compelled to pay it again.[5] And a purchaser, having notice of a judgment, will be

[1] Ibid.

[2] Ibid.; Bishop of Winchester *v.* Paine, 11 Ves. 197; Murray *v.* Ballou, 1 Johns. Ch. R. 566; Murray *v.* Finster, 2 Johns. Ch. R. 155; Griffith *v.* Griffith, 1 Hoff. Ch. R. 153.

[3] Mead *v.* Lord Orrery, 3 Atk. 242, 243; 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*n*); Id. B. 3, § 1, note (*b*).

[4] Wyatt *v.* Barwell, 19 Ves. 439; Newman *v.* Chapman, 2 Rand. 93.

[5] 2 Fonbl. Eq. B. 2, ch. 6, § 3, note (*n*); Harvey *v.* Montague, 1 Vern. R. 57; Sugden on Vend. ch. 17, § 1, 2.

bound by it, although he has not been docketed, so as to secure the priority of lien and satisfaction, attached to judgments.[1]

§ 408. To constitute constructive notice, it is not indispensable that it should be brought home to the party himself. It is sufficient, if it is brought home to the agent, attorney, or counsel of the party; for, in such cases the law presumes notice in the principal, since it would be a breach of trust in the former, not to communicate the knowledge to the latter.[2] But, in all these cases, notice to bind the principal, should be notice in the same transaction, or negotiation; for, if the agent, attorney, or counsel was employed in the same thing by another person, or in another business or affair, and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal, on account of such a defect of memory.[3] It was significantly observed by Lord Hardwicke, that if this rule were not adhered to, it would make the titles of purchasers and mortgagees depend altogether upon the memory of their counsellors and agents; and oblige them to apply to persons of less eminence as counsel, as being less likely to have notice of former transactions.

[1] Davis *v.* Earl of Strathmore, 16 Ves. 419.

[2] Com. Dig. Chancery, 4 C. 5 and 6; 2 Fonbl. Eq. B. 2, ch. 6, § 4; Sheldon *v.* Cox, 2 Eden, R. 224, 228; Jennings *v.* Moore, 2 Vern. R. 609; Sugden on Vendors, ch. 17; Astor *v.* Wells, 4 Wheat. R. 466.

[3] Com. Dig. Chancery, 4 C. 5 and 6, and cases before cited; Fitzgerald *v.* Falconberg, Fitzgibb. R. 211.

[4] Warwick *v.* Warwick, 3 Atk. 294; Worsley *v.* Earl of Scarborough, 3 Atk. 392; Lowther *v.* Carlton, 2 Atk. 242, 392. — But notice to a solicitor in one transaction, which is closely followed by and connected with another, so as clearly to give rise to a presumption that the prior transaction was present in his mind, and that he could not have forgotten it,

§ 408 *a*. Although the general rule, that notice to the agent is notice to the principal, is well established, yet there are some nice cases which may arise in the application of the rule. Thus, for example, suppose the case of a corporation acting by a board of directors, or trustees, or other officers or agents; the question may arise, whether notice to one of the board of facts unknown to all the others, will bind the corporation, or whether the notice should be offered to the board itself, or a majority of them. The authorities on this point do not seem entirely in harmony.[1]

§ 409. The doctrine, which has been already stated, in regard to the effect of notice is strictly applicable to every purchaser, whose title comes into his hands, affected with such notice. But it in no manner affects any such title, derived from another person, in whose hands it stood free from any such taint. Thus, a purchaser with notice may protect himself by purchasing the title of another *bona fide* purchaser for a valuable consideration without notice; for, otherwise, such *bonâ fide* purchaser would not enjoy the full benefit of his own unexceptionable title.[2] Indeed, he would be deprived of the marketable value of such a title; since it would be necessary to have public notoriety given to the existence of a prior incumbrance, and no buyer could be found, or none except at a depreciation equal to the value of the incumbrance. For a similar reason,

is constructive notice to his client. *A fortiori*, if it is clear that, at the time of the second transaction, the first was fully in his mind. Hargraves *v.* Rothwell, 2 Keen, R. 154, 159.

[1] See Story on Agency, § 140 *a*, 140 *b*; Commercial Bank *v.* Cunningham, 24 Pick. R. 278; Porter *v.* Bank of Rutland, 19 Verm. 410.

[2] 1 Fonbl. Eq. B. 2, ch. 6, § 2, note (*i*); Mitf. Plead. by Jeremy (1827,) p. 278 (4th edit.); Com. Dig. Chancery, 4 A. 10; 4 I. 3; 4 I. 4; 4 I. 11.

if a person who has notice, sells to another who has no notice, and is a *bona fide* purchaser, for a valuable consideration, the latter may protect his title, although it was affected with the Equity arising from notice, in the hands of the person from whom he derived it; for, otherwise, no man would be safe in any purchase, but would be liable to have his own title defeated by secret equities, of which he could have no possible means of making a discovery.

§ 410. This doctrine, in both of its branches, has been settled for nearly a century and a half in England; and it arose in a case in which A purchased an estate, with notice of an incumbrance, and then sold it to B, who had no notice; and B afterwards sold it to C, who had notice; and the question was, whether the incumbrance bound the estate in the hands of C. The then Master of the Rolls thought, that although the Equity of the incumbrance was gone, while the estate was in the hands of B, yet it was revived upon the sale to C. But the Lord Keeper reversed the decision, and held that the estate in the hands of C was discharged of the incumbrance, notwithstanding the notice of A and C.[1] This doctrine has ever since been adhered to as an indispensable muniment of title.[2] And it is wholly immaterial of what nature the Equity is, whether it is a lien, or an incumbrance, or a trust, or any other claim; for a *bona fide* purchase of an estate,

[1] Harrison *v.* Forth, Prec. Ch. 61; S. C. 1 Eq. Abridg. Notice, A. 6, p. 331.

[2] 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*i*); Brandlyn *v.* Ord, 1 West, R. 513; S. C. 1 Atk. 571; Lowther *v.* Carlton, 2 Atk. 242; Ferrars *v.* Cherry, 2 Vern. 383; Mertins *v.* Joliffe, Ambl. R. 313; Sweet *v.* Southcote, 2 Bro. Ch. R. 66; McQueen *v.* Farquhar, 11 Ves. 477, 478; Bracken *v.* Miller, 4 Watts & Serg. 102.

for a valuable consideration, purges away the Equity from the estate, in the hands of all persons, who may derive title under it, with the exception of the original party whose conscience stands bound by the violation of his trust and meditated fraud. But, if the estate becomes revested in him, the original Equity will re-attach to it in his hands.[1]

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[1] 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*i*), and cases before cited; and Kennedy *v.* Daly, 1 Sch. & Lefr. 379, Bumpus *v.* Plattner, 1 Johns. Ch. R. 219; Jackson *v.* Henry, 10 Johns. R. 185; Jackson *v.* Given, 8 Johns. R. 573; Demarest *v.* Wyncoop, 3 Johns. Ch. R. 147; Alexander *v.* Pendleton, 8 Cranch, R. 462; Ingram *v.* Pelham, Ambl. R. 153; Fitzsimmons *v.* Ogden, 7 Cranch, 218. — The rule adopted in Equity, in favor of *bonâ fide* purchasers without notice, not to grant any relief against them, is founded, as we have seen, upon a general principle of public policy. Wallwyn *v.* Lee, 9 Ves. R. 24. It is not, however, absolutely universal; for it has been broken in upon in two classes of cases. In the first place, it is not allowed in favor of a judgment creditor, who has no notice of the plaintiff's Equity. This appears to proceed upon the principle that such judgment creditor shall be deemed entitled merely to the same rights as the debtor had, as he comes in under him, and not through him; and upon no new consideration, like a purchaser. Burgh *v.* Burgh, Rep. Temp. Finch, 28. In the second place, it is not allowed in favor of a *bonâ fide* purchaser without notice, against the claims of a dowress, as such. Williams *v.* Lambe, 3 Brown, Ch. Rep. 264. This last exception is apparently anomalous; and has been established upon the distinction, that the protection of a *bonâ fide* purchaser does not apply against a party plaintiff, seeking relief upon the ground of a legal title, (such as Dower is,) but only against a party plaintiff, seeking a relief upon an equitable title. The propriety of the distinction has been greatly questioned. It has been impugned by Lord Rosslyn, in Jerrard *v.* Saunders, (2 Ves. jr. 454.) The case of Burlare *v.* Cook, (2 Freem. R. 24,) and Parker *v.* Blythmore, (2 Eq. Abridg. 79, pl. 1,) are against it. Rogers *v.* Leele, (2 Freem. R. 84,) and the above case of Williams *v.* Lambe, are in its favor. Mr. Sugden doubts the correctness of the distinction. Sugden on Vendors, ch. 18, *sub finem*, (9th edit). On the other hand Mr. Belt maintains its correctness. Belt's note (1) to 3 Brown, Ch. R. 264. So does Mr. Beames (Beam. Pl. Eq. 244, 245,) and Mr. Roper, also, in his work on Husband and Wife, Vol. 1, 446, 447. Mr. Hovenden, in his note to 2 Freem. R. 24, acquiesces in it. See also Medlicott *v.* O'Donel, 1 B. & Beatt. 171. See also Mitf.

§ 411. Indeed, purchasers of this sort are so much favored in Equity, that it may be stated to be a doctrine now generally established, that a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage, or other incumbrance upon the same estate for his protection. If he can defend himself by any of them at law, his adversary will have no help in Equity to set these incumbrances aside; for Equity will not disarm such a purchaser; but will act upon the wise policy of the Common Law, to protect and quiet lawful possessions, and strengthen such titles.[1] We shall have occasion, hereafter, in various cases, to see the application of this doctrine.

§ 412. And this naturally leads us to the consideration of the equitable doctrine of tacking, as it is technically called, that is, uniting securities, given at different times, so as to prevent any intermediate purchasers from claiming a title to redeem, or otherwise to discharge one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title.[2] Thus, if a third mortgagee,

Plead. Eq. by Jeremy, p. 274, note (*d*), (4th edit). The same distinction was expressly affirmed in Collins *v.* Archer, 1 Russ. & Mylne, 292. There is a peculiarity in the case of a dowress, which operates against her, and, upon this point of notice, is proper to be mentioned. Though notice of the title will protect every other interest in the inheritance, it will not protect hers. Maundrell *v.* Maundrell, 10 Ves. 271, 272: Wynn *v.* Williams, 5 Ves. 130; Mole *v.* Smith, Jacob, R. 497; Swannock *v.* Lifford, Ambl. R. 6; S. C. Co. Litt. 208 a; Butler's note (105); Radnor *v.* Vanderbendy, Show. Parl. Cas. 69; Ante, § 57 a; Post, § 434, 437. 630, 631.

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 3; Com. Dig. Chancery, 4 A. 10; 4 I. 3; 4 I. 11; 4 W. 29.

[2] Jeremy on Equity Jurisd. B. 1, ch. 2, § 1, p. 188 to 191.

without notice of a second mortgage, should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee would not be permitted to redeem the first mortgage without redeeming the third mortgage also; for, in such a case, Equity tacks both mortgages together in his favor. And, in such a case, it will make no difference, that the third mortgagee, at the time of purchasing the first mortgage, had notice of the second mortgage; for he is still entitled to the same protection.[1]

§ 413. There is, certainly, great apparent hardship in this rule; for it seems most conformable to natural justice, that each mortgagee should, in such a case, be paid according to the order and priority of his incumbrances.[2] The general reasoning, by which this doctrine is maintained, is this. *In æquali jure, melior est conditio possidentis.* Where the Equity is equal, the Law shall prevail; and he that hath only a title in Equity shall not prevail against a title by Law and Equity in another.[3] But, however correct this reasoning may be when rightly applied, its applicability to the case stated may reasonably be doubted. It is assuming the whole case, to say, that the right is equal, and the Equity is equal. The second mortga-

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 2, and notes (*b*), (*c*); Com. Dig. Chancery, 4 A. 10; Marsh *v.* Lee, 2 Vent. R. 337, 338; S. C. 1 Ch. Cas. 162; Maundrell *v.* Maundrell, 10 Ves. 260, 270; Morett *v.* Parke, 2 Atk. 53, 54; Matthews *v.* Cartwright, 2 Atk. 347; Robinson *v.* Davison, 1 Bro. Ch. R. 63; Newland on Contracts, ch. 36, p. 515; Sugden on Vendors, ch. 16, 17; Powell on Mortgages, Vol. 2, p. 551, Mr. Coventry's note (A).

[2] Brace *v.* Duchess of Marlborough, 2 P. Will. 492; Lowthian *v.* Hasel, 3 Bro. Ch. R. 163.

[3] Jeremy on Equity Jurisd. B. 1, ch. 2, § 1, p. 188 to 192, (4th edit.); 2 Fonbl. Eq. B. 3, ch. 3, § 1, and notes.

gee has a prior right, and at least an equal Equity; and then the rule seems justly to apply, that, where the equities are equal, that title which is prior in time, shall prevail; *Qui prior est in tempore, potior est in jure.*[1]

§ 414. It has been significantly said, that it is a plank, gained by the third mortgagee, in a shipwreck, *tabula in naufragio.*[2] But, independently of the inapplicability of the figure, which can justly apply only to cases of extreme hazard to life, and not to mere seizures of property, it is obvious, that no man can have a right, in consequence of a shipwreck, to convert another man's property to his own use, or to acquire an exclusive right against a prior owner. The best apology for the actual enforcement of the rule is, that it has been long established, and that it ought not now to be departed from, since it has become a rule of property.

§ 415. Lord Hardwicke has given the following account of the origin and foundation of the doctrine. "As to the Equity of this Court, that a third incum-

[1] Mr. Chancellor Kent, in his learned Commentaries, has expressed a strong disapprobation of the doctrine of tacking. "There is," says he, "no natural Equity in tacking, and when it supersedes a prior incumbrance, it works manifest injustice. By acquiring a still more antecedent incumbrance, the junior party acquires by substitution, the rights of the first incumbrancer over the purchased security, and he justly acquires nothing more. The doctrine of tacking is founded on the assumption of a principle which is not true in point of fact; for, as between A, whose deed is honestly acquired, and recorded to-day, and B, whose deed is with equal honesty acquired, and recorded to-morrow, the equities upon the estate are not equal. He who has been fairly prior in point of time, has the better Equity, for he is prior in point of right." 4 Kent, Comm. Lect. 58, p. 178, 179, (4th edit.)

[2] Marsh *v.* Lee, 2 Vent. 337; Wortley *v.* Birkhead, 2 Ves. 574; Brace *v.* Duchess of Marlborough, 2 P. Will. 491. See Post, § 421, *a.*

brancer, having taken his security or mortgage without notice of the second incumbrance, and then, being puisne, taking in the first incumbrance, shall squeeze out and have satisfaction before the second; that Equity is certainly established in general; and was so in Marsh *v.* Lee, by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio.* That is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since; and, I believe, was rightly settled only on this foundation by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of Law and Equity is administered here in different Courts, and creates different kind of rights in estates. And, therefore, as Courts of Equity break in upon the Common Law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and Equity on one side, this Court never thought fit, that, by reason of a prior Equity against a man, who had a legal title, that man should be hurt; and this, by reason of that force, this Court necessarily and rightly allows to the Common Law and to legal titles. But, if this had happened in any other country, it could never have made a question; for, if the Law and Equity are administered by the same jurisdiction, the rule, *Qui prior est tempore, potior est in jure,* must hold."[1]

[1] Wortley *v.* Birkhead, 2 Ves. 573. The same quotation is in 2 Fonbl. Eq. 304, B. 3, ch. 2, § 2, in n. (*c*). — Mr. Coventry, in his valuable notes to Powell on Mortgages (Vol. 2, p. 454, note,) supposes, that the English law on this subject is sanctioned by the Civil Law. In this view of the

§ 416. Indeed, so little has this doctrine of tacking to commend itself, that it has stopped far short of the

matter he is entirely mistaken. The Civil Law admits no such principle as tacking; the general rule is, Qui prior est in tempore, potior est in jure. There are two acknowledged exceptions; one, where the first incumbrancer consents to the second pledge, so as to give a priority; another is, where the second pledge is for money to preserve the property. The doctrine of the Civil Law, referred to by Mr. Coventry, simply gives to a third mortgagee, paying off a first mortgage, the same priority, by way of substitution, which the first mortgagee had. It does not change the rights of the third mortgagee, as to his own mortgage. So the doctrine is stated in the Pandects, (incorrectly referred to by Mr. Coventry,) and so is the doctrine of Domat, in the passage cited. See Dig. Lib. 20, tit. 4, l. 16; 1 Domat, B. 3, tit. 1, § 3, art. 7, and Id. § 6, art. 6, 7; Pothier, Pand. Lib. 20, tit. 4 § 1, n. 1 to 32, and especially n. 10, 11, Cod. Lib. 8, tit. 18, l. 1, 5. The language of the Civil Law, in the principal passage cited is; Plane, cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate, quam superiori exsolvit. Dig. Lib. 20, tit. 1, l. 16. In Fonblanque's Equity (2 Fonbl. B. 3, ch. 1, § 9, p. 272,) it is said in the text: "By the Civil Law the mortgage is properly a security only for the debt itself, for which it was given, and the consequences of it, as the principal sum and interest, and the costs and damages laid out in preserving it." The passage, on which reliance is had for this purpose, is the Dig. Lib. 13, tit. 7, l. 8, § 5. Cum pignus ex pactione venire potest, non solum ob sortem non solutam venire poterit, sed ob cætera quoque, veluti usuras, et quæ in id impensa sunt. Mr. Brown, in his Treatise on the Civil Law, (Vol. 1, B. 2, ch. 4, p. 202,) deduces the conclusion that Mr. Fonblanque intended to say, that it did not involve such effects, as that the heir of a mortgagor, also indebted by a bond to the mortgagee, should not redeem without also paying the bond debt, and such like provisions known to our Courts of Equity. In this Mr. Brown thinks Mr. Fonblanque is incorrect; and he relies on the text of the Code (Cod. Lib. 8, tit. 27, l. 1); At si in possessione fueris constitutus; nisi ea quoque pecunia tibi a debitore reddatur vel offeratur, quæ sine pignore debetur, eam restituere propter exceptionem doli mali non cogeris. Jure enim contendis, debitores eam solam pecuniam, cujus nomine ea pignora obligaverunt, offerentes audiri non oportere, nisi pro illa etiam satisfecerint, quam mutuam simpliciter acceperunt. Quod in secundo creditore locum non habet; nec enim necessitas ei imponitur chirographarium etiam debitum priori creditori offerre. It is apparent that this passage merely respects the right of a mortgagee to tack, as against his own debtor, a second loan without security, when his debtor seeks to redeem. It does not touch the case of tacking, so as to cut out an inter-

analogies, which would seem to justify its application;[1] and it has been confined to cases where the party, in whose favor it is allowed, is originally a *bonâ fide* purchaser of an interest in the land for a valuable consideration. Thus, if a puisne creditor, by judgment, or statute, or recognizance, should buy in a prior mortgage, he would not be allowed to tack his judgment to such a mortgage, so as to cut out a mesne mortgagee.[2] The reason is said to be, that a creditor can in no just sense be called a purchaser; for he does not advance his money upon the immediate credit of the land; and, by his judgment he does not acquire any right in the land. He has neither *jus in re*, nor *jus ad rem*; but a mere lien upon the land, which may, or may not, afterwards be enforced upon it.[3] But, if instead of being a judgment creditor, he were a third mortgagee, and should then purchase in a prior judgment, statute, or recognizance, in such case he would be entitled to tack both together. The reason for the diversity is, that in the latter case, he did originally lend his money upon the credit of the land; but, in the for-

mediate incumbrancer. Domat supports the text of Fonblanque, (1 Domat, B. 1, tit. 1, § 3, art. 4, 7, 8.) That, by the Civil Law, there can be a tacking of debts, so as to cut out an intermediate incumbrance, seems contrary to the Dig. Lib. 20, tit. 4, l. 20; Pothier, Pand. Lib. 20, tit. 4, n. 10. See 2 Story on Eq. Jurisp. § 1010, note, where this subject is examined more at large. But see 1 Brown, Civil Law, 208, and 4 Kent, Comm. Lect. 58, p. 136, note (*a*); Id. 175, 176, (4th edit.)

[1] See Thorneycraft *v.* Crockett, 2 House of Lords Cases, 239.

[2] 2 Fonbl. Eq. B. 3, ch. 3, § 1, note (*a*); Id. B. 3, ch. 1, § 9, and note (*n*); Brace *v.* Duchess of Marlborough, 2 P. Will. 492 to 495; Anon. 2 Ves. 262; Morret *v.* Paske, 2 Atk. 52, 53; Ex parte Knott, 11 Ves. 617; Belchier *v.* Butler, 1 Eden, R. 522, and Mr. Eden's note; Lacey *v.* Ingle, 2 Ph. 413. But see Wright *v.* Pilling, Prec. Ch. 499.

[3] Ibid; Averall *v.* Wade, Lloyd & Goold's Rep. 252, 262.

mer he did not; but was only a general creditor, trusting to the general assets of his debtor.[1]

§ 417. The same principle applies to a first mortgagee lending to the mortgagor a further sum upon a statute or judgment. In such a case he will be entitled to retain against the mesne mortgagee, till both his mortgage, and statute or judgment are paid; for he lent his money originally upon the credit of the land; and it may well be presumed, that he lent the farther sum upon the statute or judgment upon the same security, although it passed no present interest in the land, but gave a lien only.[2]

§ 418. And yet, such a prior mortgagee, having a bond debt, has never been permitted to tack it against any intervening incumbrancers of a superior nature between his bond and mortgage; nor against other specialty creditors; nor even against the mortgagor himself; but only against his heir, to avoid circuity of action.[3] The reason given is, that the bond debt, except

[1] Ibid; Higgin *v.* Lyddal, 1 Cas. Ch. 149; Mackreth *v.* Symmons, 15 Ves. 354.

[2] Ibid.; Shepherd *v.* Titley, 2 Atk. 352; Ex parte Knott, 11 Ves. 617, Lacey *v.* Ingle, 2 Phillips, Ch. R. 413. *A fortiori*, the same principle applies to the first mortgagee's lending on the second mortgage; for in such a case he positively lends on the credit of the land, and will be allowed to tack against a mesne incumbrancer. Morret *v.* Paske, 2 Atk. 53, 54. And even sums subsequently lent on notes, if distinctly agreed at the time, to be on the security of the mortgaged property, will be allowed to be tacked. Matthews *v.* Cartwright, 2 Atk. 347; 2 Story on Eq. Jurisp. § 1010, note.

[3] Parvis *v.* Corbet, 3 Atk. 556; Lowthian *v.* Hasel, 3 Brown, Ch. R. 163; Morret *v.* Paske, 2 Atk. 52, 53; Shuttleworth *v.* Laycock, 1 Vern. 245; Coleman *v.* Winch, 1 P. Will. 775; Price *v.* Fastnedge, Ambler, R. 685, and Mr. Blunt's note; Houghton *v.* Troughton, 1 Ves. 86; Heams *v.* Bance, 3 Atk. 630; Jones *v.* Smith, 2 Ves. jr., 376; Adams *v.* Claxton, 6 Ves. 229; 2 Fonbl. Eq. B. 3, ch. 1, § 11; Id. § 9, note (*u*). In the

in the hands of the heir, is not a charge on the land; and tacking takes place only when the party holds both securities in the same right. For if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he will not be allowed to tack two mortgages together, to the prejudice of intervening incumbrancers.[1] Neither is a mortgagee permitted to tack where the equity of redemption belongs to different persons, when the mortgagee's title to both estates occurs.[2]

§ 419. It cannot be denied, that some of these distinctions are extremely thin, and stand upon very artificial and unsatisfactory reasoning. The account of the matter given by Lord Hardwicke,[3] is probably the true one. But it is a little difficult to perceive how the foundation could support such a superstructure, or

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Roman Law, rules somewhat different prevailed. While, as we have seen, tacking was not allowed against intermediate incumbrancers, the creditor himself was, as against his debtor, allowed to tack a subsequent debt contracted by his debtor after the mortgage. Ante, § 415, note, and Post, § 420; 2 Story on Eq. Jurisp. § 1010, and note. See, also, 1 Brown, Civil Law, 202, and note 5; Id. 20, 8; 4 Kent, Comm. Lect. 58, p. 136, and note; Id. 175, 176, (2d and 3d edit.)

[1] Morret *v.* Paske, 2 Atk. 53; 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (*u*).

[2] White *v.* Hillaire, 5 Younge & Coll. 597, 609.

[3] Wortley *v.* Birkhead, 2 Ves. 574; ante, § 415, p. 443. See Berry *v.* Mutual Ins. Co. 2 Johns. Ch. R. 603, 608. — Lord Rosslyn, in Jones *v.* Smith, (2 Ves. jr. 377,) said, "Why a bond is not upon the same *footing*, I do not know. It is impossible to say why a bond may not be tacked to a mortgage as well as one mortgage to another." The asserted ground doubtless is, that a bond debt is no lien on the land, whereas a mortgage and judgment are. This may be still more distinctly shown by the rule, that a mortgagee of a copyhold estate cannot tack a judgment to his mortgage; the reason is, that a judgment does not affect or bind copyhold estates. Heir of Carmore *v.* Parke, 6 Vin. Abridg. p 222, pl. 6; cited 2 Fonbl. Eq. B. 3, ch. 1, § 9, and note (*u*); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 190, 191.

rather, why the intelligible Equity of the case, upon the principles of natural justice, should not be rigorously applied to it. Courts of Equity have found no difficulty in applying it, where the puisne incumbrancer has bought in a prior equitable incumbrance; for, in such cases they have declared, that where the puisne incumbrancer has not obtained the legal title; or where the legal title is vested in a trustee; or where he takes *in autre droit;* the incumbrances shall be paid in the order of their priority in point of time, according to the maxim above mentioned.[1] The reasonable principle is here adopted, that he who has the better right to call for the legal title, or for its protection, shall prevail.[2]

§ 420. The Civil Law has proceeded upon a far more intelligible and just doctrine on this subject. It wholly repudiates the doctrine of tacking; and gives the fullest effect to the maxim, *Qui prior est in tempore, potior est*

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1 Brace *v.* Duchess of Marlborough, 2 P. Will. 495; Ex parte Knott, 11 Ves. 618; Berry *v.* Mutual Ins. Co. 2 Johns. Ch. R. 608; Frere *v.* More, 8 Price, R. 475; Barret *v.* Weston, 12 Ves. 130; Price *v.* Fastnedge, Ambler, R. 685, and Mr. Blunt's note; Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, 2, p. 191, 193, 194; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*e*); Pomfret *v.* Windsor, 2 Ves. 472, 486; Brandly *v.* Ord, 1 Atk. 571.

2 Ibid.; Medlicott *v.* O'Donel, 1 B. & Beat. 171; 2 Fonbl. Eq. B. 2, ch. 6, § 2. — In America, the doctrine of tacking is never allowed as against mesne incumbrances, which are duly registered, for the plain reason, that the Registry Acts are held, not only to be constructive notice, but the Acts themselves, in effect, declare the priority to be fixed by the registration. Grant *v.* Bisset, 1 Caines's Cas. in Err. 112; Frost *v.* Beekman, 1 Johns. Ch. R. 298, 299; Parkhurst *v.* Alexander, 1 Johns. Ch. R. 398, 399; St. Andrew's Church *v.* Tomkins, 7 Johns. Ch. R. 14; Osborn *v.* Carr, 12 Conn. 196; Averill *v.* Guthrie, 8 Dana, 82. The same doctrine exists in other Registry Countries. Latouche *v.* Lord Dunsancy, 1 Sch. & Lefr. 137, 157. As to tacking in cases of personal property, See 2 Story, Eq. Jurisp. § 1034, 1035.

in jure; excluding it only in cases of fraud, or of consent, or of a superior Equity.[1]

§ 421. But, whatever may be thought as to the foundation of the doctrine of tacking in Courts of Equity, it is now firmly established. It is, however, to be taken with this most important qualification, that the party who seeks to avail himself of it is a *bona fide* purchaser, without notice of the prior incumbrance, at the time when he took his original security; for if he then had such notice, he has not the slightest claim to the protection or assistance of a Court of Equity; and he will not be allowed, by purchasing in such prior incumbrance, to tack his own tainted mortgage or other title to the latter.[2]

§ 421 *a.* Questions bearing a close analogy to that of tacking have also arisen, involving equities between parties asserting adverse rights. Thus, for example, where a mortgagee takes a mortgage and a covenant from sureties to pay the mortgage money, and afterwards he advanced an additional sum to the mortgagor, and took a second mortgage therefor on the premises, and subsequently he brought his action against the sureties, and recovered the amount of the first mortgage debt from them; but he refused to give up the

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[1] See Dig. Lib. 20, tit. 4, l. 16; Pothier, Pand. Lib. 20, tit. 4, § 1, n. 1 to 32; 1 Domat, B. 3, tit. 1, § 6, art. 6; ante, § 415, p. 451, note; § 418, note (1); 2 Story on Eq. Jurisp. § 1010, and note.

[2] Fonbl. Eq. B. 3, ch. 3, § 1, note (*b*); Id. B. 2, ch. 6, § 2, and note (*i*); Brace *v.* Duchess of Marlborough, 2 P. Will. 491, 495; Sugden on Vendors, ch 16, 17; Green *v.* Slater, 4 Johns. Ch. R. 38; Toulman *v.* Steere, 3 Meriv. R. 210; Powell on Mortgages, by Coventry, Vol. 2, p. 454, note A.; Com. Dig. Chancery, 4 A. 10, 4 I. 3, 4 I. 4, 4 W. 28; 4 Kent, Comm. Lect. 58, p. 176 to 179, (4th edit.); Post, § 434; Redfearn *v.* Ferrier, 1 Dow, R. 50. But see Davis *v.* Austin, 1 Ves. jr. 228; Johnson *v.* Brown, 2 Younge, & Coll. N. R. 268. Lacey *v.* Ingle, 2 Phillips, Ch. R. 413.

first mortgage, or to assign it to the sureties, without being paid the second advance, and they brought a suit against him to compel an assignment to them of the first mortgage; the question arose, whether they had a right to an assignment of the first mortgage, without paying the second advance. It was held, that they had no priority, and before they would compel an assignment, they must pay the second advance.[1]

§ 421 *b*. There are other cases, standing, indeed, upon a firmer ground than that of the mere right of tacking, where a subsequent assignee or incumbrancer of equitable property may acquire a priority over an elder assignee or incumbrancer of the same property, by his exercise of superior diligence, and doing acts which will give him a better claim or protection in Equity.[2] Thus, for example, a second incumbrancer upon equitable property, who has given notice of his title to the trustees of the property, will be preferred to a prior incumbrancer, who has omitted to give the like notice of his title to the trustees; for the notice is an effectual protection against any subsequent dealing on the part of the trustees.[3] So the second assignee of the interest of the

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1 Williams *v.* Owens, The (English) Jurist, 30 Dec., 1843, p. 1145; Post, § 499, 499 *a*.

2 Foster *v.* Blackstone, 1 Mylne & Keen, 297; Timson *v.* Ramsbottom, 2 Keen, R. 35; ante, 399, note.

3 Ibid.; ante, § 399, note; Post, § 1035 *a*, 1047, 1057; Etty *v.* Bridges, 2 Younge & Coll. 488, 492. In this case Mr. Vice-Chancellor Bruce said, "That notice should be given to the trustee of a fund upon dealing with an equitable interest in it, is not, I apprehend, so much a rule as an example, or instance, or effect of a rule. In Dearle *v.* Hall, (3 Russ. R. 1,) we find Lord Lyndhurst thus expressing himself: 'In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for after notice given, the trustee of a fund becomes a trustee for the assignee who has given him notice.' Sir Thomas Plumer's previous

assignor, in the residuary estate of a testator, who has given notice to the executors thereof, will be preferred to a prior assignee, who has given no such notice.[1] So, it is said to be a better equity, where a second incumbrancer takes a protection against a subsequent incumbrancer, which the prior incumbrancer neglected to take. Thus, a declaration of trust of an outstanding

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observations in the same case, which occur between the 20th and the 28th pages of the same volume, are, with more minuteness of detail, to the same effect. The opinions of the judges, in Ryall *v.* Rowles, (1 Ves. R. 348, 1 Atk. R. 165,) of which that of Mr. Justice Burnett has been reported from his note-book by Mr. Bligh, (9 Bligh, N. S. 578,) contain recognitions of the same principle. So the opinion in Foster *v.* Cockerell, (9 Bligh, R. N. S. 332,) of Lord Lyndhurst, upon advising the House of Lords to affirm Sir John Leach's decision in Foster *v.* Blackstone, 1 Mylne & Keen, R. 297,) in which case the latter learned Judge had before thus expressed himself: 'A better Equity is where a second incumbrancer, without notice, takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take. Thus, a declaration of trust of an outstanding term accompanied by delivery of the deeds creating and continuing the term, gives a better equity than the mere declaration of trust to a prior incumbrancer.' These authorities, though not the only authorities, are, I apprehend, more than sufficient to show the rule to be, that to perfect a transaction of the description now in question, the purchaser or incumbrancer must, if he cannot acquire possession, go as near it as he can, — as the circumstances of the case will permit, must in a sense, if the expression may be used, set his mark upon the property, or do every thing reasonably practicable to prevent it from being dealt with in fraud of an innocent purchaser afterwards. The law has held, that generally, where there are trustees, this is done sufficiently, upon dealing with an equitable interest in the fund, by giving them notice; because, although the notice does not necessarily prevent such a fraud, it renders its commission much less likely, and gives an increased probability, or an increased chance of redress, if the fraud shall be committed, supposing reasonable diligence to be used; inasmuch, as not only will the trustees, if asked, be likely to give the information of the notice, but if they shall fail to do so, they may be liable to make good the loss. It is obvious, however, that unfairness or forgetfulness, or negligence on a trustee's part, or his death, or infirmity, may render the notice, as a prevention of fraud, useless."

[1] Timson *v.* Ramsbottom, 2 Keen, R. 35; Post, § 1035 *a*, 1047, 1057.

term, accompanied by a delivery of the deeds, creating and continuing the term, will give a better equity, than a mere declaration of trust taken by a prior incumbrancer.[1]

§ 421 *c*. A different doctrine is maintained in some of the States of America; for it is there held that, as between different assignees of a *chose in action*, he who is first in time is first in right, notwithstanding he has given no notice to the debtor or the subsequent assignee. The debtor will, however, be protected, if he has made payment to the second assignee before notice of the prior assignment.[2]

§ 422. Another instance of the application of this wholesome doctrine of Constructive Fraud, arising from notice, may be seen in the dealings with executors and other persons, holding a fiduciary character, and third persons colluding with them in violation of their trust. Thus, purchases from executors of the personal property of their testator are ordinarily obligatory and valid, notwithstanding they may be affected with some peculiar trusts or equities in the hands of the executors. For the purchaser cannot be

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[1] Foster *v*. Blackstone, 1 Mylne and Keen, 297. But it will not create a prior equity in a subsequent incumbrancer, that he claims by a legal title, and the prior incumbrancer claims by an equitable title; for if notice has been duly given by the latter, his title will prevail. Ibid. It is now also settled, that an inquiry of the legal holder of equitable property, as to the state of the title, is not necessary to give effect to a notice by a subsequent assignee, so as to entitle him to a priority over a prior assignee, who has given no notice. Timson *v*. Ramsbottom, 2 Keen, R. 35.

[2] Muir *v*. Schenck, 3 Hill, R. 228. See Story on Conflict of Laws, § 328, 330. See also Murray *v*. Lichburn, 2 Johns. Ch. Cas. 441, 443; Post, § 1039; Redfearn *v*. Ferrier, 1 Dow, R. 550; Davis *v*. Austin, 1 Ves. jr. R. 228; Story on Conflict of Laws, § 375, 396; James *v*. Morey, 2 Cowen, R. 246.

presumed to know that the sale may not be required in order to discharge the debts of the testator, for which they are legally bound before all other claims.[1] But, if the purchaser knows that the executor is wasting and turning the testator's estate into money, the more easily to run away with it, or for any other unlawful purpose, he will be deemed *particeps criminis*, and his purchase set aside as fraudulent.[2]

§ 423. The reason for this diversity of doctrine has been fully stated by Sir William Grant. "It is true," (said he,) "that executors are, in Equity, mere trustees for the performance of the will; yet in many respects, and for many purposes, third persons are entitled to consider them absolute owners. The mere circumstance that they are executors, will not vitiate

[1] 2 Fonbl. Eq. B. 2, ch. 6, § 2, and notes (*k*) and (*l*); Humble *v.* Bill, 2 Vern. R. 444; Ewer *v.* Corbet, 2 P. Will. 148; McLeod *v.* Drummond, 14 Ves. 359; S. C. 17 Ves. 154, 155; Hill *v.* Simpson, 7 Ves. 166; Scott *v.* Tyler, 2 Dick. 712, 725; Newland on Contr. ch. 36, p. 512, 513, 514; Com. Dig. Chancery, 4 W. 29; Rayner *v.* Pearsall, 3 Johns. Ch. R. 578. — This doctrine was overthrown in the case of Humble *v.* Bill, (or Savage,) upon appeal to the House of Lords. 1 Bro. Parl. Cas. 71. It was, however, reasserted in Ewer *v.* Corbet, 2 P. Will. 148; Nugent *v.* Clifford, 1 Atk. 463; Elliot *v.* Merryman, 2 Atk. 42; Ithell *v.* Beane, 1 Ves. R. 215; Mead *v.* Lord Orrery, 3 Atk. 235; Dickinson *v.* Lockyer, 4 Ves. 36; Hill *v.* Simpson, 7 Ves. 152; Taylor *v.* Hawkins, 8 Ves. 209; McLeod *v.* Drummond, 14 Ves. 352; S. C. 17 Ves. 153. In this last case, the whole of the authorities were examined at large by Lord Eldon, and commented on with his usual acuteness. See also Andrews *v.* Wrigley, 4 Bro. Ch. R. 125.

[2] Worseley *v.* De Mattos, 1 Burr. 475; Ewer *v.* Corbet, 2 P. Will. 148; Mead *v.* Lord Orrery, 3 Atk. 235, 237; Benfield *v.* Solomons, 9 Ves. 86, 87; Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 359; S. C. 17 Ves. 153; Newland on Contracts, ch. 36, p. 513; 1 Madd. Ch. Pr. 228, 229, 230; Drohan *v.* Drohan, 1 Ball & Beat. 185; Com. Dig. Chancery, 4 W. 28; Scott *v.* Tyler, 2 Bro. Ch. R. 431; 2 Dick. 712, 725; Bonney *v.* Ridgard, cited 2 Bro. Ch. R. 438; 4 Bro. Ch. R. 130; Scott *v.* Nesbit, 2 Bro. Ch. R. 641; S. C. 2 Cox, R. 183.

any transaction with them; for the power of disposition is generally incident, being frequently necessary. And a stranger shall not be put to examine whether in the particular instance, that power has been discreetly exercised. But, from that proposition, that a third person is not bound to look to the trust in every respect, and for every purpose, it does not follow, that, dealing with the executor for the assets, he may equally look upon him as absolute owner, and wholly overlook his character as trustee, when he knows the executor is applying the assets to a purpose wholly foreign to his trust. No decision necessarily leads to such a consequence."[1] The same doctrine is applied to the cases of executors or administrators colluding with the debtors to the estate, either to retain or to waste the assets; for, in such cases, the creditors will be allowed to sue the debtors directly in Equity, making the executor or administrator also a party to the bill; although, ordinarily, the executor or administrator only can sue for the debts due to the deceased.[2] So, in cases of collusion between a mortgagor and mortgagee, a creditor or annuitant of the mortgagor may have a right to redeem, and to call for an account; although, ordinarily, such a right belongs only to the mortgagor, and his heirs and privies in estate.[3] Indeed, the doctrine may be even more generally stated; that he who

1 Hill *v.* Simpson, 7 Ves. 166.

2 Holland *v.* Prior, 1 Mylne & Keen, 240; Newland *v.* Champion, 1 Ves. 106; Doran *v.* Simpson, 4 Ves. 651; Alsager *v.* Rowley, 6 Ves. 748; Beckley *v.* Dorrington, West, R. 169; Post, § 581, note, § 828; Story on Equity Pleadings, § 178, 514; Burroughs *v.* Elton, 11 Ves. 29; Benfield *v.* Solomons, 9 Ves. 86.

3 White *v.* Parnther, 1 Knapp, 179, 229; Troughton *v.* Binkes, 6 Ves. 572.

has voluntarily concurred in the commission of a fraud by another, shall never be permitted to obtain a profit thereby against those who have been thus defrauded.

§ 424. It seems at one time to have been thought, that no person but a creditor, or a specific legatee of the property, could question the validity of a disposition made of assets by an executor, however fraudulent it might be. But that doctrine is so repugnant to true principles, that it could scarcely be maintained whenever it came to be thoroughly sifted.[1] It is now well understood that pecuniary and residuary legatees may question the validity of such a disposition; and, indeed, residuary legatees stand upon a stronger ground than pecuniary legatees generally; for, in a sense, they have a lien on the fund, and may go into Equity to enforce it upon the fund.[2]

§ 425. The last class of cases which it is proposed to consider under the present head of Constructive Fraud, is that of voluntary conveyances of real estate, in regard to subsequent purchasers.[3] This class is founded in a great measure, if not altogether, upon the provisions of the Statute of 27th of Eliz. ch. 4,

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[1] Mead *v.* Lord Orrery, 3 Atk. 235; 14 Ves. 361; 17 Ves. 169.

[2] Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 359; S. C. 17 Ves. 169; Bonny *v.* Redgard, cited 2 Bro. Ch. R. 438; 4 Bro. Ch. R. 130; 17 Ves. 165. — Mr. Maddock (1 Madd. Ch. Pr. 230) states, that "Residuary and general legatees, and, as it seems, co-executors, are never permitted to question the disposition which the executors have made of the assets. But creditors, and specific and pecuniary legatees, may follow either legal or equitable assets into the hands of third persons, to whom fraud is imputable." It appears to me, that the cases above cited, and especially that of McLeod *v.* Drummond, 14 Ves. 353; S. C. 17 Ves. 153, establish a different conclusion.

[3] The Statute does not extend to conveyances of personal property, but only to conveyances of real property. Jones *v.* Croucher, 1 Sim. & Stu. R. 315. See Bohn *v.* Headley, 7 H. & T. 257.

which has been already alluded to. The object of that Statute was, to give full protection to subsequent purchasers from the grantor, against mere volunteers under prior conveyances. As between the parties themselves, such conveyances are positively binding, and cannot be disturbed; for the Statute does not reach such cases.[1]

§ 426. It was for a long period of time a much litigated question in England, whether the effect of the Statute was to avoid all voluntary conveyances, (that is, all such as were made merely in consideration of natural love or affection, or were mere gifts,) although made *bonâ fide*, in favor of all subsequent purchasers, with or without notice; or whether it applied only to conveyances made with a fraudulent intent, and to purchasers without notice. After no inconsiderable diversity of judicial opinion, the doctrine has at length been established in England, (whether in conformity to the language or intent of the Statute is exceedingly questionable,) that all such conveyances are void, as to subsequent purchasers, whether they are purchasers with or without notice, although the original conveyance was *bonâ fide*, and without the slightest admixture of intentional fraud; upon the ground that the Statute, in every such case infers fraud, and will not suffer the presumption to be gainsaid.[2] The doctrine, however,

[1] Petre *v.* Espinasse, 2 Mylne & Keen, 496; Bill *v.* Claxton, Id. 503, 510; In re Grant, 2 Story, 313; Hopkirk *v.* Randolph, 2 Brock. 133; Hudnol *v.* Wilder, 4 McCord, 295.

[2] Doe *v.* Manning, 9 East. R. 58; Pulvertoft *v.* Pulvertoft, 18 Ves. 84, 86, 111; Buckle *v.* Mitchell, 18 Ves. 100; Cotterell *v.* Homer, 13 Simons, R. 506; Com. Dig. Chancery, 4 C. 7; Sterry *v.* Arden, 1 Johns. Ch. R. 261, 267 to 271; Com. Dig. *Covin*, B. 3, 4; Sugden on Vendors, ch. 16, § 1, art. 1, 2. [See the late able case of Tarlton *v.* Liddell, 7 Eng.

is admitted to be full of difficulties; and it has been confirmed, rather upon the pressure of authorities, and the vast extent to which titles have been acquired and held under it, than upon any notion that it has a firm foundation in reason and a just construction of the Statute. The rule, *Stare decisis*, has here been applied to give repose and security to titles fairly acquired, upon the faith of judicial decisions.[1]

§ 427. In America, a like diversity of judicial opinion has been exhibited. Mr. Chancellor Kent has held the English doctrine obligatory, as the true result of the authorities. But, at the same time, he is strongly inclined to the opinion, that, where the purchaser has had actual (and not merely constructive) notice, it ought not to prevail.[2] When the same case, in which

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Law & Eq. R. 360.] — The elaborate judgment of Lord Ellenborough, in Doe *v.* Manning, (9 East, R. 58,) contains a large survey of the authorities, to which the learned reader is referred. See, also, 1 Madd. Ch. Pr. 421 to 427; 1 Fonbl. Eq. B. 1, ch. 4, § 3, and notes (*f*) and (*g*); Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 188 to 192; Newland on Contracts, ch. 34, p. 391; 2 Hovenden on Frauds, ch. 18, p. 73, &c.; Belt's Suppt. to Vesey, 25, 26; Atherly on Marr. Sett. ch. 13, p. 187, &c., 193, 194; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 4, p. 408 to 411; Pulvertoft *v.* Pulvertoft, 18 Ves. 84, 86, 111; Doe *v.* Routledge, Cowper, R. 711, 712. Mr. Fonblanque has assailed the doctrine that a purchaser with notice, should still be entitled to prevail against the *bonâ fide* voluntary conveyance, with great force of reasoning. He asserts, that it amounts to an encouragement on the part of the purchaser, of a breach of that respect which is morally due to the fair claims of others; and that it may render the provisions of a statute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it. 1 Fonbl. Eq. B. 1, ch. 4, § 13, note (*g*). To which it may be added, that it affords a temptation, nay, a premium and justification on the part of the grantor, to violate those obligations which his own voluntary conveyance imports, and which, in conscience and sound morals, he is bound to hold sacred.

[1] Ibid.

[2] Sterry *v.* Arden, 1 Johns. Ch. R. 261, 270, 271; S. C. 12 Johns. R. 536.

this opinion was declared, came before the Court of Errors of New York, Mr. Chief Justice Spencer delivered an elaborate opinion against the English doctrine, and asserted, that no voluntary conveyance, not originally fraudulent, was within the Statute. The Court of Errors on that occasion, left the question open for future decision.[1] But the doctrine of Mr. Chief Justice Spencer has been asserted in the Supreme Court of the same State at a later period.[2]

§ 428. The question does not seem, positively, to have been adjudged in Massachusetts. But, in an important case of a voluntary conveyance, (which was adjudged to be intentionally fraudulent,) the Court said: "That deed conveyed his (the grantor's) title to the plaintiff, as against the grantor, and *every other person*, unless it was *fraudulent* at the time of its execution, in which case it was void against creditors and subsequent purchasers."[3] From this language it is certainly a just inference, that voluntary conveyances, *bonâ fide* made, are, in that State, valid against subsequent purchasers.

§ 429. The Supreme Court of the United States have come to the same conclusion; and it may be fit here to state the grounds of that opinion, as given by the Chief Justice, in delivering the judgment of the Court. "The Statute of Elizabeth is in force in this District [of Columbia]. The rule, which has been uniformly observed by this Court in construing statutes,

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[1] Sterry *v.* Arden, 12 Johns. R. 536, 554 to 559.

[2] Jackson *v.* Town, 4 Cowen, R. 603, 604. See Seward *v.* Jackson, 8 Cowen, R. 406; Wilkes *v.* Clarke, 8 Paige, R. 165.

[3] Ricker *v.* Ham, 14 Mass. R. 139. And see Mr. Bigelow's note, Big. Dig. *Conveyance*, p. 200.

is to adopt the construction made by the Courts of the country, by whose legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British Statutes, which are adopted in any of these States. By adopting them, they become our own as entirely as if they had been enacted by the legislature of the State. The received construction in England, at the time they were admitted to operate in this country, indeed, to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however we may respect subsequent decisions, (and certainly they are entitled to great respect,) we do not admit their absolute authority. If the English Courts vary their construction of a statute, which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

§ 430. "At the commencement of the American Revolution, the construction of the Statute of 27th of Elizabeth seems not to have been settled. The leaning of the Courts towards the opinion, that every voluntary settlement should be deemed void, as to a subsequent purchaser, was very strong; and few cases are to be found, in which such a conveyance has been sustained. But these decisions seem to have been made on the principle, that such subsequent sale furnished a strong presumption of a fraudulent intent, which threw on the person, claiming under the settlement, the burthen of proving it from the settlement itself, or from extrinsic circumstances, to be made in good faith, rather than as furnishing conclusive evidence not to be repelled by any circumstances whatever.

§ 431. "There is some contrariety and some ambi-

guity in the old cases on the subject. But this Court conceives that the modern decisions, establishing the absolute conclusiveness of a subsequent sale, to fix fraud on a family settlement, made without valuable consideration, — fraud not to be repelled by any circumstances whatever, — go beyond the construction which prevailed at the American Revolution; and ought not to be followed.

§ 432. "The universally received doctrine of that day unquestionably went as far as this. A subsequent sale without notice, by a person who had made a settlement, not on a valuable consideration, was presumptive evidence of fraud; which threw on those claiming under such settlement, the burthen of proving that it was made *bonâ fide*. This principle, therefore, according to the uniform course of this Court, must be adopted in construing the Statute of 27th of Elizabeth, as it applies to this case."[1]

§ 433. The doctrine, as to subsequent conveyances of the grantor, avoiding prior voluntary conveyances, applies in England only to purchasers strictly and properly so called,[2] for, as between voluntary conveyances, the first prevails; unless the last be for the payment of debts, which, indeed, can scarcely, under such circumstances, be called voluntary.[3] [So, a volun-

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[1] Cathcart *v.* Robinson, 5 Peters, 280.

[2] It extends to a mortgagee however. Ledyard *v.* Butler, 9 Paige, 132. But not to one who buys at a sheriff's sale. Ridgway *v.* Underwood, 4 Wash. 129.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 12; Id. B. 1, ch. 5, § 2, and note (*h*); Jeremy on Equity Jurisd. B. 2, ch. 3, p. 283, § 25; Atherley on Marr. Sett. ch. 13, p. 185; Goodwin *v.* Goodwin, 1 Ch. Rep. 92 [173]; Clavering *v.* Clavering, 2 Vern. R. 473; S. C. Prec. Ch. 235; S. C. 1 Bro. Parl. Cas. 122; Villiers *v.* Beaumont, 1 Vern. 100; Allen *v.* Arne, 1 Vern. 365;

tary conveyance by a woman in contemplation of marriage, without the knowledge of her future husband, is not avoided by the marriage, under the 27 Eliz. c. 4, since the husband does not take as a purchaser.[1]] The doctrine is also to be understood with this qualification, that the first conveyance is *bonâ fide;* for, if it is fraudulent, the second will prevail.[2] But then in cases between different volunteers, a Court of Equity will generally not interfere, but will leave the parties where it finds them as to title. It will not aid one against another; neither will it enforce a voluntary contract.[3] It has been said that there are exceptions;

Earl of Bath and Montague's case, 3 Ch. Cas. 88, 89, 93; Chadwill *v.* Dollman, 2 Vern. 530, 531; Boughton *v.* Boughton, 1 Atk. 625; Worral *v.* Worral, 3 Meriv. 256, 269; Sear *v.* Ashwell, 3 Swanst. 411, note.

[1] Doe d. Richards *v.* Lewis, 5 Eng. Law & Eq. R. 400. But the deed might have been bad, if it had been found as a fact that it was intended as a fraud on marital rights.

[2] Naldred *v.* Gilham, 1 P. Will. 580, 581; Colton *v.* King, 2 P. Will. 359; Cecil *v.* Butcher, 2 Jac. & Walk. 573 to 578; 1 Forbl. Eq. B. 1, ch. 4, § 25; Viers *v.* Montgomery, 4 Cranch, 177; Ante, § 426.

[3] Pulvertoft *v.* Pulvertoft, 18 Ves. 91, 93, 99; Coleman *v.* Sarrel, 1 Ves. jr. 52, 54; Ellison *v.* Ellison, 6 Ves. 656; Antrobus *v.* Smith, 12 Ves. 39; Ex parte Pye, 18 Ves. 140; 1 White & Tudor's Eq. Lead. Cas. 420, and notes; Minturn *v.* Seymour, 4 Johns. Ch. R. 500; Atherley on Marr. Sett. ch. 13, p. 186; Id. ch. 5, p. 125, 131 to 145; 1 Fonbl. Eq. B. 1, ch. 4, § 25, and notes (*c*) and (*i*); Id. B. 1, ch. 5, § 2, and note (*h*); § 3; Ex parte Pye, 18 Ves. 149. This doctrine, however, is to be understood with proper qualifications. If there be a voluntary contract, *inter vivos,* and something remains to be done to give it effect, as for example, if there be a voluntary contract to transfer stock, and the stock is not transferred, a Court of Equity will not enforce the transfer. But if the stock is actually transferred, then a Court of Equity will enforce all the rights growing out of the transfer against anybody. Ellison *v.* Ellison, 6 Ves. 662; Coleman *v.* Sarrel, 1 Ves. jr., 50; Pulvertoft *v.* Pulvertoft, 18 Ves. 91, 93, 99. So in the case of a voluntary assignment of a bond, even where the bond is not delivered, but is kept in possession of the assignor, a Court of Equity, in the administration of the assets of the assignor, would consider the bond as a debt due to the assignee, no farther act remaining to be done by the

and that they stand upon special grounds, such as the interference of Courts of Equity in favor of settlements

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assignor. There is a plain distinction between an assignment of stock, where the stock has not been transferred, and an assignment of a bond. In the former case the material act (the transfer) remains to be done by the grantor; and nothing is in fact done which will entitle the assignee to the aid of the Court until the stock is transferred; whereas the Court will admit the assignee of a bond as a creditor. Upon this ground where A made a voluntary assignment of a policy upon his own life to trustees, for the benefit of his sister and her children, if they should outlive him; and he delivered the deed of assignment to one of the trustees, but he kept the policy in his own possession; and afterwards surrendered the policy to the office for a valuable consideration; and afterwards a bill was brought against A by the surviving trustee in the deed to have the policy replaced; it was decreed accordingly. The Court said that the gift of the policy was complete without a delivery; that no act remained to be done by the grantor to complete the title of the trustees; and, therefore, it was not a case where the Court was called upon to assist a volunteer. Fortescue *v.* Barnett, 3 Mylne & Keen, 36. On the other hand, if something remains to be done, to give effect to the voluntary act or contract, a Court of Equity will not interfere to aid the party. Thus, where a testator had indorsed upon the back of a bond of his debtor "I do hereby forgive the said A B the sum of £700, part of the within sum of £1,200, for which he is indebted to me;" and afterwards died, and a suit was brought against the debtor at law for the full amount of the bond; and a bill was brought by him against the executor for an injunction to restrain further proceedings in the action, on the payment of all the sums due on the bond, except the £700, the Court refused to interfere, saying, that the plaintiff gave no consideration for the alleged release; and that, as the plaintiff was a mere volunteer, he had no right to come into Equity for relief. In truth, there was no technical valid release at law; and the Court was asked to supply this defect. Tuffnell *v.* Constable, 8 Sim. R. 69. See Flower *v.* Marten, 2 Mylne & Craig, 459, 471, 475; Post, § 706, 706 *a.* — Upon similar grounds where an obligee of a bond, five days before her death, signed a memorandum not under seal, which was indorsed on the bond, and which purported to be an assignment of the bond without any consideration, and at the same time delivered the bond to the assignee; it was held by the Lord Chancellor that the circumstances of the case did not constitute it a *Donatio mortis causâ* because it was unconditional; and that the gift was incomplete as an absolute gift; and, as it was without consideration, it could not be enforced by the assignee. Edward *v.* Jones, 1 Mylne & Craig,

upon a wife and children, for whom the party is under a natural and moral obligation to provide.[1] But, al-

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226; S. C. 7 Sim. R. 325. See Antrobus *v.* Smith, 12 Ves. R. 39. See also Duffield *v.* Elwes, 1 Bligh, R. 493, 529, 530, N. S., where Lord Eldon said: "The principle, which is applied in the decision of this case, is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed. But I think that is a misapprehension; because nothing can be more clear than that this *Donatio mortis causâ* must be a gift made by a donor in contemplation of the conceived approach of death; that the title is not complete, till he is actually dead; and that the question, therefore, never can be, what the donor can be compelled to do; but what the donee, in the case of a *Donatio mortis causâ* can call upon the representatives, real or personal, of that donor to do. The question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personalty — the executor, in respect of reality, — and the heir-at-law, are not bound to complete that, which as far as the act of the donor is concerned in the question was incomplete. In other words, where it is the gift of a personal chattel, or the gift of a deed, which is the subject of the *Donatio mortis causâ*, whether, after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee; and whether, on the other hand, if it be a gift affecting the real interest — and I distinguish now between a security upon land and the land itself, — whether if it be a gift of such an interest in law, the heir-at-law of the testator is not, by virtue of the operation of the trust, which is created, not by indenture, but a bequest, arising from operation of law, a trustee for that donee. I apprehend, that really the question does not turn at all upon what the donor could do, or what the donor could not do. But, if it was a good *Donatio mortis causâ*, what the donee of that donor could call upon the representatives of the donor to do, after the death of that donor."

[1] 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note (*c*); Id. B. 1, ch. 5, § 2; Atherley on Marr. Sett. ch. 3, p. 131 to 139; 1 Fonbl. Eq. B. 4, ch. 1, § 7, and note (*r*); Ellis *v.* Nimmo, Lloyd & Goold, R. 348. But see *contrà*, Holloway *v.* Headington, 8 Simons, R. 325, and Jefferys *v.* Jefferys, 1 Craig & Phillips, 138, 140; in both which cases Ellis *v.* Nimmo seems shaken, if not entirely overthrown. And see Moore *v.* Crofton, 3 Jones & Lat. 438. See Ante, § 95, 169; Post, § 706, 706 *a*, 787 *a*, 793 *b*, 973, 987, 1040 *b*.

though the doctrine in favor of such exceptions has been maintained by highly respectable authority, yet it must be now deemed entirely overthrown by the weight of more recent adjudications, in which it has been declared that the Court will not execute a voluntary contract, and that the principle of the Court to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement.[1]

§ 434. But, although voluntary conveyances and covenous conveyances may thus, although good between the parties, be set aside and held void as to creditors and purchasers, and others, whom they may injure in their rights and interests; yet we are not to understand, that Courts of Equity grant this relief, and interpose in favor of the latter, under all circumstances. On the contrary, they never do interpose at all, where the property has been conveyed by the voluntary and covenous grantee to a *bonâ fide* purchaser for a valuable consideration without notice. Such a person is a favorite in the eyes of Courts of Equity, and is always protected (as has been already intimated) against claims of this sort.[2] Indeed, in every just sense, his Equity

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[1] Lord Cottenham, in Jefferys *v.* Jefferys, 1 Craig & Phillips, R. 138, 141; S. P. Holloway *v.* Headington, 8 Simons, R. 325. See also Post, § 706, 706 *a*, 787, 793 *b*, 973, 987; Tuffnell *v.* Constable, 8 Sim. R. 69; Meek *v.* Kettlewell, before Lord Lyndhurst in the (English) Jurist, 23 Dec. 1843, p. 1121.

[2] Com. Dig. Chancery, 4 I. 3, 4 I. 11, 4 W. 29; Ante, § 381; Atherley on Marr. Sett. ch. 5, p. 128; ch. 14, p. 238; 2 Fonbl. Eq. B. 3, ch. 3, § 1, and notes; Id. B. 2, ch. 6, § 2; Com. Dig. *Covin*, B. 3, 4; *Chancery*, 4 I. 3, 4 I. 4, 4 W. 29; Sugden on Vendors, ch. 16, § 10; Prodgers *v.* Langham, 1 Sid. R. 123; Parr *v.* Eliason, 1 East, 92, 95; Sterry *v.* Arden, 1 Johns. Ch. R. 261, 271; S. C. 12 Johns. R. 536; Roberts *v.* Anderson, 3 Johns. Ch. R. 377, 378; S. C. 18 Johns. R. 513; Bean *v.*

is equal to that of any other person, whether he be a creditor, or a purchaser of the grantor; and, where the Equity is equal, we have seen, that the rule applies, *Potior est conditio possidentis.*[1] And, where there is a *bona fide* purchaser from the voluntary or fraudulent grantor, and another from the voluntary or fraudulent grantee, the grantees will have preference, according to the priority of their respective titles.[2]

[§ 434 *a.* So, another qualification or exception to the general doctrine concerning the statute 27 Eliz. c. 4, has lately been laid down, viz.: that in order that a subsequent conveyance to purchasers for value should have the effect to defeat a prior voluntary conveyance, it is essential that both conveyances should be made by one and the same person. Therefore, where a voluntary conveyance had been made by an ancestor in his lifetime, and afterwards his devisee conveyed the same property to a *bona fide* purchaser for value, it was held that the first conveyance was not fraudulent and void, under the statute 27 Eliz. c. 4, as against the subsequent purchase. And the Court said the principle upon which voluntary conveyances had been held fraudulent and void as against subsequent purchasers for value was, that by the second sale the vendor so entirely repudiated the former conveyance, as that,

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Smith, 2 Mason, R. 278, 279, 280; Gore *v.* Brazier, 3 Mass. R. 541; State of Connecticut *v.* Bradish, 14 Mass. R. 296; Trull *v.* Bigelow, 16 Mass. R. 406; Ante, § 64 *c*, 108, 139, 381, 409.

1 2 Fonbl. Eq. B. 3, § 1; Id. B. 2, ch. 6, § 2; 1 Fonbl. B. 1, ch. 4, § 25; Fletcher *v.* Peck, 6 Cranch, 87, 133; Ante, § 298.

2 Anderson *v.* Roberts, 18 Johns. R. 513; S. C. 3 Johns. Ch. R. 377, 378; Sands *v.* Hildreth, 14 Johns. R. 498. But see Preston *v.* Crofut, 1 Connect. R. 527, note; Sugden on Vendors, ch. 16, § 10; Doe d. Newman *v.* Rusham, 9 Eng. Law & Eq. R. 417.

against himself and the purchaser for value, it should be conclusively taken, that the intention to sell existed when he made the voluntary conveyance, and that it was made in order to defeat the subsequent purchaser. And that this principle did not apply where the grantor in the second conveyance was a different person from him who made the voluntary conveyance, for the acts of one man could not show the mind and intention of another.[1]]

§ 435. The Civil Law proceeded upon the same enlightened policy. In the case of alienations of movables and immovables, *bona fide* purchasers for a valuable consideration, having no knowledge of any fraudulent intent of the grantor or debtor, were protected. *Ait prætor; Quæ fraudationis causa gesta erunt, cum eo, qui fraudem non ignoraverit, actionem dabo.*[2] Upon this, there follows this comment. *Hoc Edictum eum coërcet, qui sciens eum in fraudem creditorum hoc facere, suscepit, quod in fraudem creditorum fiebat. Quare, si quid in fraudem creditorum factum sit, si tamen is, qui cepit, ignoravit, cessare videntur verba Edicti.*[3] And the very case is afterwards put, of a *bonâ fide* purchaser from a fraudulent grantee, the validity of whose purchase is unequivocally affirmed. *Is, qui a debitore, cujus bona possessa sunt, sciens rem emit, iterum alii bona fide emenli vendidit; quæsitum sit, an secundus emptor conveniri potest?*

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[1] Doe d. Newman *v.* Rusham, 9 Eng. Law & Eq. R. 410, overruling Jones *v.* Whittaker, 1 Longf. & Tours. Ir. R. 14. On the other hand, it has been held in America, that a purchaser for value of the administrator of a person who had made a voluntary conveyance, might avoid the former deed as a subsequent purchaser under 27 Eliz. c. 4; Clapp *v.* Leatherbee, 18 Pick. 131.

[2] Dig. Lib. 42, tit. 8, l. 1.

[3] Dig. Lib. 42, tit. 8, l. 6, § 8; 1 Domat, B. 2, tit. 10, § 1, art. 3.

Sed verior est Sabini sententia, bona fide emptorem non teneri; quia dolus ei duntaxat nocere debeat, qui eum admisit; quemadmodum diximus, non teneri eum, si ab ipso debitore ignorans emerit. Is autem, qui dolo malo emit, bona fide autem ementi vendidit, in solidum pretium rei, quod accepit, tenebitur.[1] The same doctrine is fully recognized by Voet.[2] And its intrinsic justice is so persuasive and satisfactory, that, whether derived from Roman sources or not, it would have been truly surprising not to have found it embodied in the jurisprudence of England.[3]

§ 436. Indeed, the principle is more broad and comprehensive; and, although not absolutely universal (for we have seen that there are anomalies in the case of judgment creditors, and the case of dower);[4] yet it is generally true, and applies to cases of every sort, where an Equity is sought to be enforced against a *bona fide* purchaser of the legal estate without notice, or even against a *bona fide* purchaser, not having the legal estate, where he has a better right or title to call for the legal estate than the other party.[5] It applies there-

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[1] Dig. Lib. 42, tit. 8, l. 9; Pothier, Pand. Lib. 42, tit. 8, art. 3, § 25.

[2] 2 Voet, Comm. Lib. 42, tit. 8, § 10, p. 195.

[3] Wilson *v.* Worral's case, Godb. 161; Bean *v.* Smith, 2 Mason, 279 to 281; Anderson *v.* Roberts, 18 Johns. R. 513.

[4] See Ante, § 57 *a*, 108, 381, 410, note; Post, § 630, 631; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note, p. 22; 2 Fonbl. Eq. B. 2, ch. 6, § 2, notes (*h*) and (*i*); Id. B. 3, ch. 3, § 1, note (*a*); Id. B. 6, ch. 3, § 3, note (*i*); 1 Fonbl. Eq. B. 1, ch. 1, § 7, note (*u*); Id. B. 1, ch. 1, § 3, note (*f*), p. 22; Id. B. 1, ch. 5, § 4; Jeremy on Eq. Jurisd. B. 2, ch. 3, p. 283; Mitford, Pl. Eq. by Jeremy, 274, note (*d*).

[5] 2 Fonbl. Eq. B. 2, ch. 6, § 2, and note (*h*); 1 Fonbl. B. 7, ch. 4, § 25, and note (*e*); Id. B. 1, ch. 1, § 7; Sugden on Vendors, ch. 16; 2 Chance on Powers, ch. 23, § 1, art. 2859 to 2863; Pomfret *v.* Windsor, 2 Ves. 472, 486; Medlicott *v.* O'Donel, 1 B. & Beatt. 171; Ex parte Knott, 11 Ves. 618; Brace *v.* Duchess of Marlborough, 2 P. Will. 495; Ante, § 64 *c*, 108, 139, 381, 409, 411; Post, § 434, 436.

fore, to cases of accident and mistake, as well as to cases of fraud, which, however remediable between the original parties, are not relievable, as against such purchasers, under such circumstances.[1]

§ 437. We have thus far gone over the principal grounds upon which Courts of Equity grant relief in matters of accident, mistake and fraud. In all these cases, (to recur to a train of remark already suggested,) it may be truly asserted, that the remedy and relief administered in Courts of Equity, are, in general, more complete, adequate, and perfect, than they can be at Common Law. The remedy is more complete, adequate, and perfect, because Equity uses instruments and proofs not accessible at law; such as an injunction, operating to prevent future injustice, and a bill of discovery, addressing itself to the conscience of the party in matters of proof. The relief, also, is more complete, adequate, and perfect, inasmuch as it adapts itself to the special circumstances of each particular case; adjusting all cross equities; and bringing all the parties in interest before the Court, so as to prevent multiplicity of suits and interminable litigation.[2] Courts of Law, on the other hand, cannot do more than pronounce a positive judgment in a set formulary, for the plaintiff or for the defendant, without professing or attempting to qualify that judgment, according to the relative equities of the parties. Thus, if a deed is fraudulently obtained without consideration, or for an adequate consideration; or, if by fraud, accident, or mistake, a deed is framed contrary to the intention of the parties in

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[1] Ante, § 64 *c*, 108, 381, 409, 410, 434; Post, § 630, 631.

[2] See Mitf. Pl. Eq. by Jeremy, p. 111, 112, 113.

their contract on the subject; the forms of proceeding in the Courts of Common Law will not admit of such an investigation of the matter in those Courts, as will enable them to do justice. The parties claiming under the deed have, therefore, an advantage in proceeding in a Court of Common Law, which it is against conscience they should use. Courts of Equity will (as we have seen), on this very ground, interfere to restrain proceedings at law, until the matter has been properly investigated. And, if it finally appears that the deed has been improperly obtained; or that it is contrary to the intention of the parties in their contract; these Courts will, in the first case, compel a delivery and cancellation of the deed; or order it to be deposited with an officer of the Court; and will farther direct a reconveyance of the property, if it has been so conveyed that a reconveyance may be necessary. In the second case, they will either rectify the deed according to the intention of the parties; or they will restrain the use of it in the points in which it has been framed contrary to, or it has gone beyond their intention in the original contract.[1]

§ 438. In like manner, Courts of Equity will (as we have seen) aid defective securities under like circumstances. They will also interfere, not only to relieve against instruments which create rights; but against those which destroy rights; such as a release fraudulently or improperly obtained.[2] And, finally, they will not only prevent the unfair use of any advantage in proceeding in a Court of ordinary jurisdic-

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[1] Mitf. Pl. Eq. by Jeremy, 128, 129; Id. 112, 113.
[2] Mitf. Pl. Eq. by Jeremy, 129, 130.

tion, gained by fraud, accident, or mistake; but they will, also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights.[1]

§ 439. The flexibility of Courts of Equity, too, in adapting their decrees to the actual relief required by the parties, in which their proceedings form so marked a contrast to the proceedings at the Common Law, is illustrated in a striking manner, in cases of accident, mistake, and fraud. If a decree were in all cases required to be given in a prescribed form the remedial justice would necessarily be very imperfect, and often wholly beside the real merits of the case. Accident, mistake and fraud, are of an infinite variety in form, character, and circumstances; and are incapable of being adjusted by any single and uniform rule. Of each of them one might say, *Mille trahit varios adverso sole colores.* The beautiful character, or pervading excellence, if one may so say, of Equity Jurisprudence, is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case, in all its complex habitudes. Thus, (to present a summary of what has been already stated,) if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and cancelled.[2] If they are money securities, on which the money has been paid, the money is decreed to be paid back. If they are deeds, or other muniments of title, detained from the rightful party, they are decreed to be delivered up.[3] If they are deeds depressed or

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[1] Mitf. Pl. Eq. by Jeremy, 131.

[2] See 1 Madd. Ch. Pr. 208, 211, 212, 261; Mitf. Pl. Eq. by Jeremy, 127, 128, 132.

[3] Mitf. Pl. Eq. by Jeremy, 124.

spoliated, the party is decreed to hold the same rights, as if they were in his possession and power.[1] If there has been any undue concealment, or misrepresentation, or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith.[2] If the party says nothing, but by his expressive silence misleads another to his injury, he is compellable to make good the loss; and his own title, if the case requires it, is made subservient to that of the confiding purchaser.[3] If the party, by fraud or misrepresentation, induces another to do an act injurious to a third person, he is made responsible for it.[4] If by fraud or misrepresentation, he prevents acts from being done, Equity treats the case, as to him, as if it were done; and makes him a trustee for the other.[5] If a will is revoked by a fraudulent deed, the revocation is treated as a nullity.[6] If a devisee obtains a devise by fraud, he is treated as a trustee of the injured parties.[7] In all these, and many other cases which might be mentioned, Courts of Equity undo what has been done, if wrong; and do what has been left undone, if right.

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[1] Mitf. Pl. Eq. 117, 118; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 3, § 1, 385, &c.; 1 Madd. Ch. Pr. 211, 258.

[2] 1 Madd. Ch. Pr. 209, 210; 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes.

[3] 1 Madd. Ch. Pr. 211; 1 Fonbl. Eq. B. 1, ch. 3, § 4, and notes (*m*) and (*n*)

[4] 3 P. Will. 131, note; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 1, p. 388, 389.

[5] 1 Madd. Ch. Pr. 552; 1 Jac. & Walk. 96; 11 Ves. 638.

[6] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13; Id. B. 1, ch. 2, § 13, note (*q*). But see Ambler, R. 215; 3 Bro. Ch. R. 156, note; 7 Ves. 373, 374.

[7] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13; 2 Fonbl. B. 4, Pt. 1, ch. 1, § 3, and note (*g*); Mitf. Pl. Eq. by Jeremy, 257.

§ 440. We may conclude this head by calling the attention of the reader to the remark, (which has been necessarily introduced in another place,) that Courts of Equity will exercise a concurrent jurisdiction with Courts of Law in all matters of fraud, excepting only of fraud in obtaining a will, which, if of real estate, is constantly referred to a Court of Law to decide it, in the shape of an issue of *devisavit vel non*;[1] and which, if of personal estate, is, in England, cognizable in the Spiritual or Ecclesiastical Courts.[2] But, even in this case the bill may be retained, to abide the decision in the proper Court, and relief be decreed according to the event.[3] No other excepted case is known to exist; and it is not easy to discern the grounds upon which this exception stands, in point of reason or principle, although it is clearly settled by authority.[4] But, where the fraud does not go to the whole will, but only to some particular clause; or where the fraud is in unduly obtaining the consent of the next of kin to the Probate; Courts of Equity will lay hold of these circumstances to declare the executor a trustee for the next of kin.[5]

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[1] See Gould *v.* Gould, 3 Story, R. 537.

[2] Ante, § 184, 238; Allen *v.* Macpherson, 5 Beav. R. 469; S. C. on appeal, 1 Phillips, Ch. R. 133.

[3] See Ante, § 184, note; and Gaines & Wife *v.* Chew, 2 Howard, Sup. Ct. R. 619, 645.

[4] Ante, § 184, 238, 252, 254; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 3, and note (*e*); Kerrick *v.* Bransby, 3 Brown, Parl. Cas. 358; 7 Bro. Parl. Cas. by Tomlins, p. 437. See Wild *v.* Hobson, 2 Ves. & B. 108; Mitf. Pl. Eq. by Jeremy, 257; Barnesley *v.* Powell, 1 Ves. 284; Id. 119; 1 Madd. Ch. Pr. 206; Jones *v.* Jones, 7 Price, R. 663; Allen *v.* Macpherson, 1 Phill. Ch. R. 133.

[5] Mitf. Pl. Eq. by Jeremy, 257; Barnesley *v.* Powell, 1 Ves. 284; Tucker *v.* Phipps, 3 Atk. R. 360; Allen *v.* Macpherson, 1 Phill. Ch. R. 133. In this last case many of the former decisions are collected in which Courts of Equity have granted relief in cases of fraud in wills. See the opinion cited at large, Ante, § 184, note; and also the other authorities cited in the same note.

CHAPTER VIII.

ACCOUNT.

§ 441. HAVING disposed of these three great heads of concurrent equitable jurisdiction in matters of accident, mistake, and fraud, the undisputed possession of which has belonged to Courts of Equity from the earliest period, which can be traced out in our juridical annals, we may now pass to others of a different and less extensive character. We allude to the heads, where the jurisdiction, although it may attach upon any or all of the grounds above mentioned, is not necessarily dependent upon them, and, in fact, is exercised in a variety of cases where they do not apply, upon another distinct ground, namely, that the subject-matter is, *per se*, within the scope of equitable jurisdiction. Among these are Matters of Account, and, as incident thereto, Matters of Apportionment, Contribution, and Average; Liens, Rents, and Profits; Tithes, and Moduses, and Waste; Matters of Administration, Legacies, and Marshalling of Assets; Confusion of Boundaries; Matters of Dower; Marshalling of Securities; Matters of Partition; Matters of Partnership; and, lastly, Matters of Rent, so far as they are not embraced in the preceding head of Account.

§ 442. Let us begin with matters of ACCOUNT. One of the most ancient forms of action at the Common Law is the action of Account. But the modes of proceeding in that action, although aided from time to

time by statutable provisions, were found so very dilatory, inconvenient, and unsatisfactory, that as soon as Courts of Equity began to assume jurisdiction in matters of account, as they did at a very early period, the remedy at law began to decline; and, although some efforts have been made in modern times to resuscitate it, it has in England fallen into almost total disuse.[1] Courts of Equity have for a long time exercised a general jurisdiction in all cases of mutual accounts, upon the ground of the inadequacy of the remedy at law; and have extended the remedy to a vast variety of cases (such as to implied and constructive trusts,) to which the remedy at law never was applied.[2] So that now the jurisdiction extends, not only to cases of an equitable nature, but to many cases where the form of the account is purely legal, and the items, constituting the account, are founded on obligations purely legal. Upon such legal obligations, however, suits, although not in the form of actions of Account, yet in the form of Assumpsit, Covenant, and Debt, are still daily prosecuted in the Courts of Common Law,[3] and legal defences are

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[1] In Godfrey *v.* Saunders, (3 Wilson, R. 73, 113, 117,) which is one of the few modern actions of Account in England, Lord Chief Justice Wilmot said, (p. 117,) "I am glad to see this action of Account is revived in this Court." Mr. Gwillim, in his edition of Bac. Abridg. title, *Accompt*, p. 31, note (*a*), seemed to think, that the action of Account did not deserve the character usually given of it. But the Parliamentary Commissioners, in their second Report on the Common Law, 8 March, 1830, (p. 9, 25, 26,) have no scruple to admit its inconvenience and dilatoriness, and that it has gone into disuse. See, also, Buller, N. P. 217; 2 Reeves, Hist. of the Law, 73, 178, 337; 3 Reeves, Hist. L. 388; 4 Reeves Hist. L. 378; Crousillat *v.* McCall, 5 Binn. 433; 3 Black. Comm. 164.

[2] See Corporation of Carlisle *v.* Wilson, 13 Ves. 275; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 13, 14; Bac. Abridg. *Accompt* B.

[3] It was at one time doubted, whether an action of Assumpsit would lie for the balance of an account, where there are items on both sides.

there brought forward. But even in these cases, as the Courts possess no authority to stop the ordinary progress of such suits, for the purpose of subjecting the matters in dispute to the investigation of a more convenient tribunal than a jury, unless the parties agree to a voluntary arrangement for this purpose, the cause often proceeds to trial in a manner wholly unsuitable to its real merits.[1]

§ 443. The difficulties in the modes of proceeding in actions of Account, and the convenience of the modes of proceeding in suits in equity, to attain the ends of substantial justice, are stated in an elementary work of solid reputation, with great clearness and force. The language of the learned author is as follows: "The proceedings in this action being difficult, dilatory and expensive, it is now seldom used, especially if the party have other remedy, as Debt, Covenant, Case; or if the demand be of consequence, and the matter of an intricate nature; for, in such case, it is more advisable to resort to a Court of Equity, where matters of accompt are more commodiously adjusted, and determined more

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But it is now fully established that, however numerous the items may be, still, if there appears any thing due on one side, an action of Assumpsit will lie for the balance. Tomkins *v.* Willshear, 5 Taunt. R. 431; S. C. 1 Marsh. R. 115, and the cases there cited; 2 Saund. 127, Williams's note (*d*). The use of the old action of Account is there said to be, where the plaintiff wants an account, and cannot give evidence of his right without it. Ib.

[1] 2 Parl. Common Law Rep. 1830, p. 25, 26; Wilkin *v.* Wilkin, Salk. 9; 3 Black. Comm. 184. — The Parliamentary Commissioners, in their second Report on the Common Law, (8 March, 1830, p. 26,) proposed to invest the Courts of Common Law with power to refer such accounts to auditors in such cases; a suggestion, which has since been adopted; as, indeed, it had been adopted before in some of the American States. See Duncan *v.* Logan, 3 Johns. Ch. R. 361; Act of Massachusetts, 20th Feb. 1818, ch. 142.

advantageously for both parties; the plaintiff being entitled to a discovery of books, papers, and the defendant's oath; and, on the other hand, the defendant being allowed to discount the sums paid or expended by him; to discharge himself of sums under forty shillings by his own oath; and if by answer or other writing he charges himself, by the same to discharge himself, which will be good, if there be no other evidence. Farther, all reasonable allowances are made to him; and if after the accompt is stated, any thing be due to him upon the balance, he is entitled to a decree in his favor."[1]

§ 444. To expound and justify the truth of these remarks, it may be well to take a short review of the old action of Account, and to see to what narrow boundaries it was confined, and by what embarrassments it was surrounded.

§ 445. At the Common Law, an action of Account lay only in cases where there was either a privity in deed, by the consent of the party, as against a bailiff or receiver appointed by the party, or a privity in law, *ex provisione legis*, as against a guardian in socage.[2] An exception, indeed, or rather an extension of the rule, was, for the benefit of trade and the advancement of commerce, allowed in favor of and between merchants; and, therefore, by the Law Merchant, one naming himself a merchant might have an account against another, naming him a merchant, and charge him as receiver.[3]

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[1] Bac. Abridg. *Accompt.* See, also, 1 Eq. Abridg. p. 5, note (*a*); Anon. 1 Vern. 283; Wicherly *v.* Wicherly, 1 Vern. 470; Marshfield *v.* Weston. 2 Vern. 176.

[2] Co. Litt. 90 *b*; Id. 172 *a*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note; Bac. Abridg. *Accompt* A; Com. Dig. *Accompt* A 1; 2 Inst. 379.

[3] Co. Litt. 172 *a*; Earl of Devonshire's Case, 11 Co. R. 89.

But, in truth, in almost every supposable case of this sort, there was an established privity of contract. With this exception, however, (if such it be,) the action was strictly confined to bailiffs, receivers, and guardians in socage.[1] So strictly was this privity of contract construed, that the action did not lie by or against executors and administrators. The Statute of 13th of Edw. III. ch. 23, gave it to the executors of a merchant; the Statute of 25th of Edw. III., ch. 5, gave it to the executors of executors; and the Statute of 31st of Edw. III., ch. 11, to administrators.[2] But it was not until the Statute of 3d and 4th of Anne, ch. 16, that it lay against executors and administrators of guardians, bailiffs, and receivers.[3]

§ 446. But in all cases of this latter sort, although there was no remedy at the Common Law, yet a bill in Equity might be maintained for an account against the personal representatives of guardians, bailiffs, and receivers; and such was the usual remedy prior to the remedial Statute of Anne.[4] And no action of Account lay at the Common Law against wrong-doers;[5] or by one joint tenant, or tenant in common, or his executors or administrators, against the other, as bailiff, for receiving more than his share; or against his executors or administrators, unless there was some special contract

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[1] Buller's N. P. 127; 1 Eq. Abridg. 5, note (*a*); 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*); Co. Litt. 172 *a*; 2 Inst. 379; Sargent *v.* Parsons, 12 Mass. R. 149.

[2] Co. Litt. 90 *b*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*).

[3] Ibid.; Bull. N. P. 127; Earl of Devonshire's Case, 11 Co. R. 89.

[4] 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*n*); 1 Eq. Abridg. 5, note (*a*).

[5] Bac. Abridg. *Accompt* B. — We shall presently see that Courts of Equity frequently administer relief in cases of Account against wrong-doers. See Bac. Abridg. *Accompt* B.; Bosanquet *v.* Dashwood, Cas. T. Talb. 38, 41.

between them, whereby the one made the other his bailiff; for the relation itself was held not to create any privity of contract by operation of law.[1] This defect was afterwards cured by the Statute of 3d and 4th of Anne, ch. 16.[2] The Common Law was strict, as to who was to be accounted a bailiff or receiver; for a bailiff was understood to be one who had the administration and charge of lands, goods, and chattels, to make the best benefit for the owner, and against whom, therefore, an action of Account would lie for the profits, which he had made, or might, by his industry or care, have reasonably made; his reasonable charges and expenses being deducted.[3] A receiver was one, who received money to the use of another to render an account; but upon his account he was not allowed his expenses and charges, except in the case of merchant receivers. And this exception was provided (as it was said) by the law of the land in favor of merchants, and for the advancement of trade and traffic.[4] So that it will be at once perceived from these cases, (and many others might be mentioned,)[5] that the remedy at the Common Law was very narrow; and, although it was afterwards enlarged, that would not of itself displace the jurisdiction originally vested in Courts of Equity.

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1 Co. Litt. 172, and Harg. note (8); Co. Litt. 186 *a*, 119 *b*, and Harg. note (83); Wheeler *v.* Horne, Willes, R. 208; 2 Fonbl. Eq. B. 2, ch. 7, § 6, note (*n*); Bac. Abridg. *Accompt* A.; 1 Saund. R. 216, Williams's note.

2 Ibid.; 3 Black. Comm.

3 Co. Litt. 172 *a*; 2 Fonbl. Eq. B. 2, ch. 7, § 6, and note (*n*).

4 Co. Litt. 172 *a*.

5 See Bac. Abridg. *Accompt* B., C.; Com. Dig. *Accompt* A., B., D.; 3 Reeves, Hist. L. 337, 338, 339; 3 Reeves, Hist. L. 75; 4 Reeves, Hist. L. 388.

§ 446 *a*. In the next place, as to the modes of proceeding in actions of Account. At the Common Law, before either the Statute of Marlebridge, ch. 23, or of Westminister 2d, ch. 11, there were two methods of proceedings against an accountant; one, by which the party, to whom he was accountable, might, by consent of the accountant, either take the account himself, or assign an auditor or auditors to take it; and then have his action of Debt for the arrearages; or, in more modern times, an action on the Case, or *Insimul computassent*. And the accountant, if aggrieved, might have his writ of *Ex parte talis*, to reëxamine the account in the Exchequer. The other proceeding of the plaintiff was, in the first instance, by way of a writ of Account. The process, by which this latter remedy might be made more effectual, is particularly described in the Statute of Marlebridge, and the Statute of Westminster 2d, upon which it is unnecessary to dwell.[1]

§ 447. In the action of Account, there are two distinct courses of proceeding. In the first place, the party may interpose any matter in abatement or bar of the proceeding; and, if he fails in it, then there is an interlocutory judgment, that he shall account (*Quod computet*) before auditors.[2] After this judgment is entered, it is the duty of the Court to assign auditors, who are armed with authority to convene the parties before them, *de die in diem*, at any time or place they shall appoint until the accounting is determined. The time by which the account is to be settled is prefixed by the Court. But, if the account be of a long or

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[1] Com. Dig. *Accompt* A. and note (*a*); 3 Reeves, Hist. Law, 75, 76.
[2] 3 Black. Comm. 164; O'Conner *v.* Spaight, 1 Sch. & Lefr. 309.

confused nature, the Court will, upon the application of the parties, enlarge the time. In taking the account, the auditors in an action of Account at the Common Law could not administer an oath, except in one or two particular cases. But, under the Statute of 3d and 4th Anne, ch. 16, the auditors are empowered to administer an oath, and examine the parties touching the matters in question, in cases within that act.[1]

§ 448. If, in the progress of the cause before the auditors, when the items are successively brought under review, any controversy should arise before the auditors, as to charging or discharging any items, the parties have a right, if the points involve matters of fact, to make up and join issues upon such items respectively; and, if the points involve matters in law, they have a right in like manner to put in and join demurrers upon each distinct item. These issues, when so made up, are to be certified by the auditors to the Court; and then the matters of law will be decided by the Court; and the matters of fact will be directed to be tried by a jury, after which the accounts are to be settled by the auditors according to the results of these trials. From this circumstance the proceedings before the auditors are often tedious, expensive and inconvenient.[2] And, indeed, as different points both of fact and law may arise in different stages of the suit, and in different examinations before the auditors, as well after as before such issues have been joined and tried,

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[1] Co. Litt. 199, and Harg. note (83); Wheeler *v.* Horne, Willes, R. 208, 210; 1 Selwin, N. P. 6; Buller, N. P. 127; Bac. Abridg. *Wager of Law*, C.

[2] Ex parte parte Bax, 2 Ves. 388; Bac. Abridg. *Accompt* F.; Bull. N. P. 127, 128; Crousillat *v.* McCall, 5 Binn. 433; Com. Dig. *Accompt* E. 11; Yelverton, R. 202, Metcalf's note (1).

it ought not to be surprising, that the cause should be procrastinated for a great length of time, by its transition from one tribunal to another, for the various purposes incident to a due settlement of its merits. And besides these difficulties, there are many actions of Account in which the defendant may wage his law, and thus escape from answering his adversary's claim.[1]

§ 449. This summary view of the modes of proceeding in the action of Account is sufficient to show, that it was a very unfit instrument to ascertain and adjust the real merits of long, complicated, and cross accounts. In the first place, it was inapplicable to a vast variety of cases of equitable claims, of constructive trusts, of fraudulent contrivances, and of tortious misconduct.[2] In the next place, there was a want of due power to draw out the proper proofs from the party's own conscience; so that if evidence *aliunde* was unattainable, there was, and there could be, no effective redress.[3] And it has been well observed by Mr. Justice Blackstone, that, notwithstanding all the legislative provi-

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[1] Com. Dig. *Pleader*, 2 W. 45; Co. Litt. 90 *b*; Ib. 295 *b*; 2 Saund. Rep. 65 *a*; Archer's Case, Cro. Eliz. 579; Bac. Abridg. *Wager of Law*, D., G.

[2] See 1 Fonbl. B. 1, ch. 1, § 3, note (*f*), p. 13, 14; 2 Fonbl. Eq. B. 2, ch. 7, § 67.

[3] Mr. Chancellor Kent, in Duncan *v.* Lyon, (3 Johns. Ch. R. 361,) said, "I have not been able to find any good reason, why that action [Account] has so totally fallen into disuse," assigning, as a ground of his remark, that "in that action the auditors have all the requisite powers; for they can compel the parties to account, and be examined under oath." If what is stated in the text be correct, it is manifest, that the action of Account, as administered in England, cannot be admitted to be an equivalent for a Court of Equity. It is, perhaps, uncertain, whether the learned Chancellor did not mean to confine his remarks to the actual state of the action in New York. See on this point the opinion of the same learned Judge, in Ludlow *v.* Simond, 2 Cain. Cas. Err. 52, 53.

sions in aid of the Common Law action of Account, "It is found by experience, that the most ready and effectual way to settle these matters of account is by a bill in a Court of Equity, where a discovery may be had on the defendant's oath, without relying merely on the evidence, which the plaintiff may be able to produce."[1]

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[1] 3 Black. Comm. 164; ante, § 67. Lord Redesdale, in Attorney-General *v.* Mayor, &c. of Dublin, 1 Bligh, R. N. S. 336, 337, gives a summary statement of the old action of account, and of the reasons of its discontinuance. He said, "There has not been in this case a sufficient investigation of the ancient law and practice on the subject of account. It seems to have been conceived, that the common law had provided sufficient means for calling to account all persons liable to account. But it was found by experience, that the writ of account was a very imperfect and inefficient mode of proceeding. In the case of an individual there can be no doubt, that if a person had received the rents of an estate belonging to a minor, for which he would be accountable, the law provided a writ to call such person to account, and to compel payment of what should be found due upon the account. Yet it is every day's practice, although the common law has provided this remedy, for Courts of Equity to take upon themselves the investigation of accounts on behalf of infants suing by their next friends. The writ of account at common law did not exclude but rather was superseded by the jurisdiction of the Courts of Equity on this subject; because the proceeding in equity was found to be the more convenient mode of calling parties to account, — partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of Courts of Equity. There is, on this subject, a writ in the Register, (Reg. Brev. p. 138,) which recites, that the King had been given to understand that his predecessors had granted certain rates on all merchandise brought into a town, to be applied to the walling of the town; and the inhabitants having complained that the rates collected had not been duly applied, the writ proceeds in the nature of a commission for taking the account. Under such circumstances, an information at this moment would lie at the suit of the Attorney-General, for taking such account. The practice of proceeding by information rather than by the writ of account, has prevailed, in consequence of the difficulty of proceeding under the writ. That persons under such circumstances should be rendered accountable by virtue of the writ, is said to be according to the law and custom of England."

§ 450. Courts of Equity, in suits of this nature, proceed, in many respects, in analogy to what is done at law. The cause is referred to a master, (acting as an auditor,) before whom the account is taken, and he is armed with the fullest powers, not only to examine the parties on oath, but to make all the inquiries by testimony under oath, and by documents, and books, and vouchers, to be produced by the parties, which are necessary for the due administration of justice. And when his report is made to the Court, any objections which have been made before the master, and any exceptions taken to his report, may be reëxamined by the Court at the instance of the parties, and the whole case is moulded, as *ex æquo et bono* may be required.[1] The Court may, besides, bring all the proper parties in interest before it, where there are different parties concerned in interest; and, if any doubt arises upon any particular demand, it may direct the same to be ascertained by an issue and verdict at law.[2] So that there cannot be any real doubt that the remedy in Equity, in cases of account, is generally more complete and adequate than it is or can be at law.[3]

§ 451. This has, accordingly, been considered in modern times, as the true foundation of the jurisdiction.[4] Mr. Justice Blackstone has, indeed, placed it upon the sole ground of the right of Courts of Equity, to compel a discovery, — "For want" (said he) "of this dis-

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[1] Ex parte Bax, 2 Ves. 388.

[2] 1 Eq. Abridg. A., p. 5, note (*a*).

[3] See Mitford on Pl. Eq. by Jeremy, 120; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279; ante, § 67.

[4] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504; Mitf. Pl. Eq. by Jeremy, 120; Ludlow *v.* Simond, 2 Cain. Err. 38, 52; Rathbone *v.* Warren, 10 Johns. R. 595, 596; Post *v.* Kimberly, 9 Johns. R. 493; Duncan *v.* Lyon, 3 Johns. Ch. R. 361.

covery at law, the Courts of Equity have acquired a concurrent jurisdiction with every other Court in matters of account."[1] But this, although a strong, yet is not the sole ground of the jurisdiction. The whole machinery of Courts of Equity is better adapted to the purpose of an account in general; and in many cases, independent of the searching power of discovery, and supposing a Court of Law to possess it, it would be impossible for the latter to do entire justice between the parties; for equitable rights and claims, not cognizable at law, are often involved in the contest.[2] Lord Redesdale has justly said, that in a complicated account, a Court of Law would be incompetent to examine it at *Nisi Prius*, with all the necessary accuracy.[3] This is the principle on which Courts of Equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account, that it cannot be properly taken at law; and until the result of the account is known, the justice of

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[1] 3 Black. Comm. 437. See, also, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12. — Mr. Fonblanque, too, seems to consider that the greater portion of the concurrent jurisdiction of Courts of Equity stands upon a similar ground; for he says, that the Courts of Equity, having acquired cognizance of the suit, for the purposes of discovery, will entertain it for the purpose of relief, in most cases of Fraud, Account, Accident, and Relief. 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 12. This might justify the jurisdiction; but it does not appear to me to include the whole ground, on which it is maintainable. Mr. Justice Blackstone also traces to the same compulsive power of discovery, the jurisdiction of Courts of Equity in all matters of fraud. 3 Black. Comm. 439. This, as the original or sole ground for the jurisdiction in matters of fraud, admits of still more question.

[2] Ante, § 67.

[3] O'Connor *v.* Spaight, 1 Sch. & Lefr. 309. See White *v.* Williams, 8 Ves. 193; Mitf. Eq. Pl. by Jeremy, 119, 120.

the case cannot appear.[1] Matters of account (he has added) may, indeed, be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of Account shows it. The only judgment was, that the party should account, and then the account was taken by the auditors. The Court never went into it.[2]

§ 452. It is not improbable, that originally, in cases of account, which might be cognizable at law, Courts of Equity interfered upon the special ground of accident, mistake, or fraud. If so, the ground was very soon enlarged, and embraced mixed cases, not governed by these matters. The Courts soon arrived at the conclusion, that the true principle, upon which they should entertain suits for an account, in matters cognizable at law, was, that either a Court of Law could not give any remedy at all, or not so complete a remedy as Courts of Equity. And the moment this principle was adopted in its just extent, the concurrent jurisdiction became almost universal, and reached almost instantaneously its present boundaries.[3]

§ 453. In virtue of this general jurisdiction in matters of account, Courts of Equity exercise a very ample authority over matters apparently not very closely connected with it, but which naturally, if not necessarily, attach to such a jurisdiction. Mr. Justice Blackstone has said, "As incident to accounts, they take a concurrent cognizance of the administration of personal assets;

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1 O'Connor *v.* Spaight, 1 Sch. & Lefr. 309; Id. 205; Mitf. Pl. Eq. by Jeremy. 120; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504.

2 Ibid.; Cooper, Eq. Pl. 134.

3 Ante, § 67; Corporation of Carlisle *v.* Wilson, 13 Ves. 278.

consequently, of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, factors, and receivers. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts."[1] But it is far from being admitted, that the sole origin of Equity Jurisdiction on these subjects, arises from this source. It is one, but not the sole source. In many of these cases, as well as in others, which will hereafter be considered, in which accounts may be taken, as incidents to the relief granted, there are other distinct if not independent sources of jurisdiction; and especially one source, which is the peculiar attribute of Courts of Equity, the jurisdiction over trusts not merely express, but implied and constructive.[2]

§ 454. One of the most difficult questions, arising under this head, (and which has been incidentally discussed in another place,)[3] is to ascertain whether there are any, and, if any, what are the true boundaries of Equity Jurisdiction in such matters of account, as are cognizable at law. We say cognizable at law; for, wherever the account stands upon equitable claims, or has equitable trusts attached to it, there is no doubt that the jurisdiction is absolutely universal, and without exception; since the party is remediless at law.[4]

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[1] 3 Black. Comm. 437.

[2] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 522, 523, 543; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*y*); 2 Fonbl. Eq. B. 2, ch. 7, § 6, and notes.

[3] Ante, § 67.

[4] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 504, 505, 506.

§ 455. But in cases where there is a remedy at law, there is no small confusion and difficulty in the authorities. The jurisdiction in matters of this sort has been asserted to be maintainable upon two grounds, distinct in their own nature, and yet often running into each other.[1] In the first place it has been asserted, that where, in a matter of account, the party seeks a discovery of facts, and these appear upon his bill to be material to his right of recovery; there, if the answer does, in fact, make a discovery of such material facts, (for it would be no ground of jurisdiction if the discovery failed,)[2] the Court having once a rightful jurisdiction of the cause, ought to proceed to give relief, in order to avoid multiplicity of suits.[3] And this plain

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[1] See Ante, § 64 to 69, and note (1) to § 69; Corporation of Carlisle *v.* Wilson, 13 Ves, 278, 279. — Lord Chancellor Erskine, in Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279, maintained the concurrent jurisdiction of Courts of Equity, in matters of account, to a very broad extent. He said: "The principle upon which Courts of Equity originally entertained suits for an account, where the party had a legal title, is, that, though he might support a suit at law, a Court of Law either cannot give a remedy, or cannot give so complete a remedy as a Court of Equity; and by degrees, Courts of Equity assumed a concurrent jurisdiction in cases of Account: for it cannot be maintained, that this Court interferes, only when no remedy can be had at law. The contrary is notorious." — "The proposition asserted against this bill is, that this Court ought to refuse to interfere, by directing an account, if an action for money had and received, or an indebitatus assumpsit, can be maintained. That proposition cannot be maintained," &c. — "The proposition is, not that an account may be decreed in every case, where an action for money had and received, or indebitatus assumpsit, may be brought (and certainly, indebitatus assumpsit lies for tolls); but that, where the subject cannot be so well investigated in those actions, this Court exercises a sound discretion in decreeing an account." See what was said by Mr. Vice-Chancellor Wigram in Pearce *v.* Cresswick, 2 Hare, R. 286, 293, cited Ante, § 64 *k*, note.

[2] Ante, § 71, 74; Russell *v.* Clarke's Ex'rs, 7 Cranch, 69; Dinwiddie *v.* Bailey, 6 Ves. 140, 141.

[3] Ryle *v.* Haggie, 1 Jac. & Walk. 237.

ground is asserted by the learned author of the Treatise of Equity, in a passage already cited; and it has been often maintained in the English Courts of Equity.[1] But, (as we have already seen)[2] there are other authorities in the English Courts, which conflict with this doctrine; and which, without attempting to lay down any rule for a practical discrimination as to cases within, and cases without the jurisdiction, seem to deliver over the subject to interminable doubts.[3]

§ 456. The doctrine now generally (perhaps not universally) held in America, is, (as we have seen,)[4] that in all cases where a Court of Equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation, upon which the Court may proceed to grant full relief. In other words, where the Court has legitimately acquired jurisdiction over the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain the suit also for relief.[5]

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[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Ante, § 64, 66; 2 Fonbl. Eq. B. 6, ch. 3, § 6; Lee *v.* Alston, 1 Bro. Ch. R. 195, 196; Barker *v.* Dacie, 6 Ves. 688; Corporation of Carlisle *v.* Wilson, 13 Ves. 278, 279.

[2] Ante, § 64 *k*, 65, 66; 1 Fonbl. Eq. B. 1, ch. 3, note (*f*); note (*r*); Parker *v.* Dee, 2 Ch. Cas. 200, 201; 1 Eq. Abridg. A., p. 5, 2 Eq. Abridg. A., p. 4; Ryle *v.* Haggie, 1 Jac. & Walk. 237.

[3] See Ante, § 64 to 69, and note (1) to § 69; Ambrose *v.* The Dunmow Union, 9 Beavan, R. 512. — Many of the cases on this head have been already commented on at large, in the note (1) to § 69. The difficulty of reconciling the authorities is very great. Is there any distinction between cases of Account founded in *privity*, and those founded in *tort*, (such as a waste, &c.)?

[4] Ante, § 67, 71, 74; Middletown Bank *v.* Russ, 2 Connect. R. 135.

[5] See Ante, § 64 to 69, 71; Armstrong *v.* Gilchrist, 2 Johns. Cas. 424; Rathbone *v.* Warren, 10 Johns. R. 587; King *v.* Baldwin, 17 Johns. R. 384; Ludlow *v.* Simond, 2 Cain. Cas. Err. 1, 38, 39, 51, 52; Stanley *v.* Cramer, 4 Cowen, R. 727, 728. In Fowle *v.* Lawrason, 5 Peters, Sup. Ct. R. 495, Mr. C. Just. Marshall, in delivering the opinion of the Court,

§ 457. Another and more general ground has been asserted for the jurisdiction; and that is, not that there is not a remedy at law; but that the remedy is more complete and adequate in Equity; and besides, that it prevents a multiplicity of suits. This is, indeed, a very broad and general ground of jurisdiction; and especially as applied to cases founded in privity of contract, where it is contemplated that the matter should give rise to an account.[1] Upon this ground, Lord Hardwicke expressed himself in favor of the jurisdiction generally, in a case then before him, saying; "It is a matter of contract and account, and con-

said: "That a Court of Chancery has jurisdiction in matters of account cannot be questioned; nor can it be doubted that this jurisdiction is often beneficially exercised; but it cannot be admitted that a Court of Equity may take cognizance of every action, for goods, wares and merchandise sold and delivered, or of money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, on which different sums of money have become due and different payments have been made. Although the line may not be drawn with absolute precision; yet it may be safely affirmed that a Court of Chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a Court of Equity is undoubted. It is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts, or some difficulty at law should interpose, some discovery should be required, in order to induce a Court of Chancery to exercise jurisdiction. 1 Madd. Chan. 86; 6 Ves. 136; 9 Ves. 437. In the case at bar these difficulties do not occur. The plaintiff sues on a contract by which real property is leased to the defendant, and admits himself to be in full possession of all the testimony he requires to support his action. The defendant opposes to this claim as an offset, a sum of money due to him for goods sold and delivered, and for money advanced; no item of which is alleged to be contested. We cannot think such a case proper for a Court of Chancery."

[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5; Barker *v.* Dacie, 6 Ves. 688; 3 Black. Comm. 437.

sequently a proper subject for the jurisdiction of this Court."[1] And this is manifestly the doctrine maintained by Lord Redesdale, who said that in matters of account, "A Court of Equity will entertain jurisdiction of a suit, though a remedy might perhaps be had in the Courts of Common Law. The ground upon which Courts of Equity first interfered in these cases, seems to have been the difficulty of proceeding to the full extent of justice in the Courts of Common Law." And, in a note, it is added: "Perhaps, in some of these cases, the jurisdiction was first assumed to prevent multiplicity of suits."[2] He subsequently said: "The Courts of Equity, having gone the length of assuming jurisdiction in a variety of complicated cases of account, &c., seem by degrees to have been considered as having on these subjects a concurrent jurisdiction with the Courts of Common Law, in cases where no difficulty could have attended the proceedings in those Courts."[3] In cases of mutual accounts founded in privity of contract, this doctrine is, in the English Courts, acted upon in the most ample manner in our day, without any limitation;[4] as it certainly is fully maintained in America.[5]

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1 Billon *v.* Hyde, 1 Atk. 127, 128.

2 Mitford on Pl. Eq. by Jeremy, 119, 120; Barker *v.* Dacie, 6 Ves. 688; Mackenzie *v.* Johnston, 4 Madd. R. 374.

3 Mitf. Pl. Eq. by Jeremy, 123. See also O'Connor *v.* Spaight, 1 Sch. & Lefr. 309; Barker *v.* Dacie, 6 Ves. 688; Corporation of Carlisle *v.* Wilson, 13 Ves. 276; Coop. Eq. Pl. Introd. 31; Duke of Leeds *v.* Radnor, 2 Bro. Ch. R. 338, 518.

4 Dinwiddie *v.* Bailey, 6 Ves. 140, 141; 2 Parl. Rep. of Common Law Commissioners, 1830, p. 26; Courtenay *v.* Godshall, 9 Ves. 473.

5 Armstrong *v.* Gilchrist, 2 Johns. Cas. 424; Rathbone *v.* Warren, 10 Johns. R. 587; King *v.* Baldwin, 17 Johns. R. 384; Ludlow *v.* Simond, 2 Cain. Err. 1, 38, 39, 51, 52; Post *v.* Kimberly, 9 Johns. R. 493; Hawley *v.* Cramer, 4 Cowen, R. 727, 728; 2 Parl. Report of the Common Law Commissioners, 1830, p. 26; Porter *v.* Spencer, 2 Johns. C. R. 171.

§ 458. Courts of Equity will also entertain jurisdiction in matters of account, not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account, and is obtained.[1] But, in such a case, if no discovery is asked, or required by the frame of the bill, the jurisdiction will not be maintainable.[2] And, *à fortiori*, where there are no mutual

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[1] Barker *v.* Dacie, 6 Ves. 687, 688; Frietas *v.* Don Santos, 1 Y. & Jerv. 574, Courtenay *v.* Godshall, 9 Ves. 473; Mackenzie *v.* Johnston, 4 Madd. R. 371; Massey *v.* Banner, 4 Madd. R. 416, 417; Ludlow *v.* Simond, 2 Cain. Err. 1, 38, 52; Post *v.* Kimberley, 9 Johns. R. 470, 493. The Vice-Chancellor (Sir John Leach) has held generally, that, in all cases of agency, a bill will lie in Equity for an account by the principal against his agent. Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 1 Madd. R. 416. The ground seems to be, though not explicitly stated by him, that, there being a necessity for a discovery, the relief is consequent on that; and that it would be most unreasonable, that he should pay his agent for a discovery, and then be turned round to a suit at law, which would be the case, if he could not have relief on his bill. The case of Hoare *v.* Contencin, (1 Bro. Ch. R. 27,) is distinguishable; for there the bill was to recover back money lent, and no discovery seemed necessary. Lord Thurlow said: "As to an account, this is only of a repayment of money, and that the money for which the teas sold should be deducted. As it stood originally, therefore, the bill could not have been supported." In Frietas *v.* Don Santos, (1 Y. & Jerv. 574,) the Court of Exchequer said: "It is the settled practice at this time, that, if a bill be filed for a discovery, the relief is made ancillary to it; and the party must stand or fall by the discovery, &c. It is not every account, which will entitle a Court of Equity to interfere. It must be such an account as cannot be taken, justly and fairly, in a Court of Law." The same doctrine was asserted in King *v.* Rossett, (2 Y. & Jerv. 33,) which was a bill by a principal against his agent for discovery and relief. Lord Chief Baron Comyns, in his invaluable Digest, (Chancery, 2 A.,) lays down the principle broadly upon his own authority, that "Chancery will oblige any one to give an account for money by him received."

[2] Dinwiddie *v.* Bailey, 6 Ves. 136; Frietas *v.* Don Santos, 1 Y. & Jerv. 574; King *v.* Rossett, 2 Y. & Jerv. 33; Cooper, Eq. Pl. 134; but see Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 4 Madd. R. 416; Foley *v.* Hill, 2 House of Lords Cases, 28; Com. Dig. Chancery, 2 A.

demands but a single matter on one side, and no discovery is required, a Court of Equity will not entertain jurisdiction of the suit, although there may be payments on the other side, which may be set off; for, in such a case, there is not only a complete remedy at law, but there is nothing requiring the peculiar aid of Equity, to ascertain or adjust the claim.[1] To found the jurisdiction, in cases of a claim of this sort, there should be a series of transactions on one side, and of payments on the other.

§ 458 *a*. So it has been said, "That if there be a bill for an account in respect of particular items, or any number of particular items, and the plaintiff fails in sustaining the demand upon those particular items, and the bill happens to contain a general vague charge, that there are voluminous and intricate accounts between the parties, and which charge is inserted merely as a pretext for the purpose of bringing the case within the jurisdiction of a Court of Equity, the Court, in so vague and uncertain a case, will disregard that general allegation, will consider it as struck out of the bill, and not allow it to protect the bill against a demurrer for want of Equity."[2]

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[1] Wells *v.* Cooper, cited in Dinwiddie *v.* Bailey, 6 Ves. 139; Foster *v.* Spencer, 2 Johns. Ch. R. 171; Moses *v.* Lewis, 12 Price, R. 502; King *v.* Rossett, 2 Y. & Jerv. 33; 1 Madd. Ch. Pr. 70, 71.

[2] Darthez *v.* Clemens, 6 Beavan, R. 165, 169. On this occasion, Lord Langdale said: "It therefore comes to this, does this bill contain such vague and general statements, statements put in merely as a pretext for transferring the jurisdiction from the Court of law to this Court? If the account can be fairly taken in a Court of Common Law, this Court will not interfere, even in the case of merchants' accounts consisting of mutual dealings; but in this case I am persuaded not only that the accounts between these parties could not be advantageously taken in a Court of Law, but that they could not be taken at all there. Everybody knows how an action upon such an account would necessarily end; it would end in the account being taken in this Court, or by a reference."

§ 459. So that on the whole, it may be laid down, as a general doctrine, that in matters of account, growing out of privity of contract, Courts of Equity have a general jurisdiction, where there are mutual accounts, (and *à fortiori*, where these accounts are complicated,) and also where the accounts are on one side, but a discovery is sought, and is material to the relief.[1] And, on the other hand, where the accounts are all on one side, and no discovery is sought or required; and also, where there is a single matter on the side of the plaintiff seeking relief, and mere set-offs on the other side, and no discovery is sought or required; in all such cases Courts of Equity will decline taking jurisdiction of the cause.[2] The reason is, that no peculiar remedial process or functions of a Court of Equity are required; and if, under such circumstances, the Court were to entertain the suit, it would merely administer the same functions in the same way as a Court of Law would in the suit. In short, it would act as a Court of Law.

§ 459 *a*. APPROPRIATION. In matters of account, where several debts are due by the debtor to the creditor, it often becomes material to ascertain to what debt a particular payment made by the debtor is to be applied. This is called in our law the appropriation of payments. It is called in the foreign law the imputation of payments,[3] a phrase apparently borrowed from the Roman Law, where the doctrine of the appropriation of payments is

[1] Mackenzie *v.* Johnston, 4 Madd. R. 374; Massey *v.* Banner, 4 Madd. R. 416, 417; Pendleton *v.* Wambersie, 4 Cranch, R. 73.

[2] See Ante, § 458, and cases there cited. But see Com. Dig. Chancery, 2 A.

[3] Pothier on Oblig. by Evans, n. 528; (Id. n. 561, Fr. edit. 1824.)

carefully examined, and the leading distinctions applicable to it amply discussed.[1] The doctrine may, of course, find a place wherever there exist separate and independent debts between the parties; but it is chiefly in cases of running accounts between debtor and creditor, where various payments have been made, and various credits have been given at different times, that its application is felt in its full force and importance, especially where the dealings have been with a firm, as for example, with bankers, and one or more of the partners have deceased, and the customer still continues his dealings with the new firm, or the survivors of the old firm, and moneys have been paid in, and drawn out, from time to time.[2] The same question, also, often occurs, in cases of public officers, where they have given different bonds, at different times, with different sureties, for the faithful performance of their duties, and moneys have been received by them at different periods, embracing one or more of the bonds. How, in such cases, where running accounts are kept of debts and payments, of credits and receipts, are the payments, made at different times, before and after the change of the firm, or the change of sureties, to be appropriated? This, in former times, was a matter of no inconsiderable embarrassment and difficulty. At present, the following propositions may be deemed well settled. In the first place, in the case of running accounts between parties, where there are various items of debt on one side, and various items of credit on the other side, occurring at different times,

[1] Pothier, Pand. Lib. 46, tit. 3, n. 89 to n. 103.

[2] Bank of Scotland *v.* Christie, 8 Clark & Finnell. R. 214.

and no special appropriation of the payments is made by either party, the successive payments or credits are to be applied to the discharge of the items of debit, antecedently due, in the order of time in which they stand in the account; or, in other words, each item of payment or credit is applied in extinguishment of the earliest items of debt standing in the account, until the whole payment or credit is exhausted.[1] In the next place, where there are no running accounts between the parties, and the debtor himself makes no special appropriation of any payment, there the creditor is generally at liberty to apply that payment to any one or more of the debts which the debtor owes him, whether it be upon an account or otherwise.[2]

§ 459 *b*. The doctrine here stated proceeds partly upon the presumed intention of the parties, and partly upon a rule which has been assumed in our law, that the debtor has a right to appropriate any payments which he makes, to whatever debt due to his creditor, he may choose to apply it. If the debtor omits to make any such appropriation, then the creditor has a

[1] Clayton's case, 1 Meriv. R. 572, 604, 608; Devaynes *v.* Noble, 1 Meriv. R. 585; Bodenham *v.* Purchase, 2 Barn. & Ald. 39; Simson *v.* Cooke, 1 Bing. R. 452; Simson *v.* Ingham, 2 Barn. & Cressw. 65; Pemberton *v.* Oakes, 4 Russ. R. 154; Bank of Scotland *v.* Christie, 3 Clark & Finnell. R. 214, 229; United States *v.* Kirkpatrick, 9 Wheat. 720, 737, 738; United States *v.* Wardwell, 5 Mason, R. 82, 87; McDowell *v.* The Blackstone Canal Co. 5 Mason, R. 11; The Postmaster-General *v.* Furber, 4 Mason, R. 333, 335; Gass *v.* Stinson, 3 Sumner, R. 99, 110–112; Williams *v.* Griffith, 5 Mees. & Welsb. 300; Campbell *v.* Hodgson, Gow. R. 71; Hall *v.* Wood, 14 East, R. 213, n.; Thompson *v.* Brown, Mood. & Malk. 40; Taylor *v.* Kymer, 3 Barn. & Adolph. 320, 333; Copland *v.* Tentman, 1 West (H. of L.) R. 364; S. C. 7 Clark & Finnell.

[2] Lysaght *v.* Walker, 3 Bligh, R. (N. S.) 1, 28; Bosanquet *v.* Wray, 6 Taunt. R. 597; Brooke *v.* Enderby, 2 Brod. & Bing. R. 10; Post, § 459 *g*.

right to appropriate the payment to such debts, due to him by the debtor, as he may choose.[1] And, if neither party has made any appropriation thereof, then the law will make the appropriation according to its own notion of the equity and justice of the case, and so that it may be most beneficial to both the parties.[2] In this view, the appropriation of payments upon running accounts, as above stated, seems most consonant to the intentions and interests of both of the parties, and is full of equity and justice.[3]

§ 459 *c*. The Roman Law proceeded, in a great measure, if not altogether, upon similar principles. But, according to that Law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor: *In re præsenti, hoc est statim atque solutum est: — cæterum postea non permittitur.*[4] If neither applied the payment, the law

[1] See Upham *v.* Lefavour, 11 Metc. 174.

[2] United States *v.* January & Pattleson, 7 Cranch, R. 572; U. States *v.* Kirkpatrick, 9 Wheat. R. 720, 737, U. States *v.* Wardwell, 5 Mason, R. 82; Postmaster-General *v.* Furber, 4 Mason, R. 333; Gass *v.* Stinson, 3 Sumner, R. 99, 110 to 112, Post, § 459 *d*; Smith *v.* Lloyd, 11 Leigh, R. 512; Seymour *v.* Van Slyck, 8 Wend. R. 403; U. States *v.* Eckford's Ex'ors, 1 Howard, Sup. Ct. R. 250; S. C. 17 Peters, R. 251; 2 Greenleaf on Evid. § 530 to § 535.

[3] Ibid. As to what circumstances will amount to an appropriation or not, see Taylor *v.* Kymer, 3 Barn. & Adolph. 320, 333, 334; Marryatts *v.* White, 2 Starkie, R. 101; Goddard *v.* Hodges, 1 Cromp. & Mees. 33; Wright *v.* Laing, 3 Barn. & Cressw. 165; Birch *v.* Talbott, 2 Starkie, R. 74; Simson *v.* Ingham, 2 Barn. & Cressw. 65.

[4] Dig. Lib. 46, tit. 3, l. 5. The text of the Roman Law on this whole subject will be found in the American Law Magazine for April, 1843, (Philad.) p. 36, 37, 38, with a learned dissertation on the whole subject. Mr. Ch. Just. Gibson has contested the leading doctrines of that article, whether satisfactorily or not, it will be for the profession to decide. But it may be affirmed, without scruple, that whoever studies the subject the most profoundly, will be very likely to find that all the difficulties are not as easily solved, as he, upon a slight examination, might be led to suppose.

made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the actual intention of the debtor, that would, in the first instance, have governed; so it was his presumable intention that was first resorted to, as the rule by which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was, What application would be most beneficial to the debtor? The payment was consequently applied to the most burdensome debt,—to one that carried interest, rather than to that which carried none,—to one secured by a penalty rather than to that which rested on a simple stipulation;—and if the debts were equal, then to that which had been first contracted. *In his vero, quæ præsenti die debentur, constat, quotiens indistincte quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet,—id est, si omnia nomina similia fuerint,—in antiquiorem.*[1] Pothier, in his edition of the Pandects, has collected together all the texts of the Roman Law on this subject;[2] and he has summed up the general results in his Treatise on Obligations.[3]

[1] Dig. Lib. 46, tit. 3, Qu. 5; Clayton's case, 1 Meriv. R. 601, 605.

[2] Pothier, Pand. lib. 46, tit. 3, art. 1, n. 89 to 99. The doctrine of the Roman Law is still more fully shown, and compared with the Common Law decisions, in a very able note to the case of Pattison v. Hull, 9 Cowen, R. 773 to 777, to which I gladly refer.

[3] Pothier, Oblig. by Evans, n. 528 to 535; Id. n. 561 to n. 572, French, 2d edit. 1829; Gass *v.* Stinson, 3 Sumner, R. 98, 111. It may not be without use to insert here the leading rules stated by Pothier: "First Rule. The debtor has the power of declaring on account of what debt he intends to apply the sum which he pays. The reason which Ulpian gives is evident, 'possumus enim certam legem dicere, ei quod solvimus.' According to our rule, although regularly the interest should be paid

§ 459 *d*. Now, the whole of this doctrine of the Roman Law turns upon the intention of the debtor,

before the principal, yet if the debtor of the principal and interest, upon paying a sum of money, has declared that he paid on account of the principal, the creditor who has agreed to receive it cannot afterwards contest such application. Second Rule. If the debtor, at the time of paying, makes no application, the creditor to whom the money is due, for different causes, may make the application by the acquaintance which he gives. It is requisite, 1st. That this application be made at the instant. 2d. That it be equitable. Third Rule. When the application has neither been made by the debtor nor by the creditor, it ought to be made to that debt which the debtor at the time had the most interest to discharge. The application should rather be made to a debt which is not contested than to one that is; rather to a debt which was due at the time of payment than to one which was not. Among several debts which are due the application ought rather to be made to the debt for which the debtor was liable to be imprisoned than to debts merely civil, in respect of which process could only issue against his effects. Among civil debts the application should rather be made to those which produce interest than to those which do not. The application ought rather to be made to an hypothecatory debt than to another. The application ought rather to be made to the debt for which the debtor had given sureties than to those which he owed singly. The reason is, that in discharging it, he discharges himself from two creditors, from his principal creditor, and from his surety, whom he is obliged to indemnify. Now, a debtor has more interest to be acquitted against two than against a single creditor. The application ought rather to be made for a debt of which the person who has paid was principal debtor, than to those which he owed as surety for other persons. Fourth Rule. If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application should be made to that of the longest standing. Observe, that of two debts contracted the same day, but with different terms, which are both expired, the debt of which the term was the shorter, and consequently which expired sooner, is understood to be the more ancient. Fifth Rule. If the different debts are of the same date, and in other respects equal, the application should be made proportionately to each. Sixth Rule. In debts which are of a nature to produce interest, the application is made to the interest before the principal. This holds good even if the acquittance imported that the sum was paid to the account of the principal and interest, 'in sortem et usuras.' The clause is understood in this sense, that the sum is received to the account of the principal after the interest is satisfied. Observe, that if the sum paid exceeds what is due for interest, the remainder is applied to the principal, even if the application had been expressly made to the interest, without mentioning the principal."

either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases he had a right to do; implied when he knowingly has allowed the creditor to make a particular application at the time of payment, without objection; presumed, when in the absence of any such special appropriation, it is most for his benefit to apply it to a particular debt. And, notwithstanding there are contradictory and conflicting authorities on this subject in the English and American Courts, one should think that the doctrine of the Roman Law is, or at least ought to be held, and may well be held, to be the true doctrine to govern in our Courts. There is a great weight of Common Law authority in its favor; and, in the conflict of judicial opinion, that rule may fairly be adopted, which is most rational, convenient and consonant to the presumed intention of the parties. If the creditor has a right, in any case, to elect to what debt to appropriate an indefinite payment, it seems proper that he should have it only when it is utterly indifferent to the debtor, to which it is applied, and then perhaps, his consent that the creditor may apply it, as he pleases, may fairly be presumed.[1]

§ 459 *c*. Be this, however, as it may, in the actual application of the doctrine to cases of partnership,

[1] Ante, § 459 *b*; 459 *d*; Gass *v.* Stinson, 3 Sumner, R. 98, 111; Pattison *v.* Hull, 9 Cowen, R. 747, 765 to 773; Clayton's case, 1 Meriv. R. 605, 606, 607, 608. But see Hall *v.* Wood, 14 East, 243, n.; Kirby *v.* Duke of Marlborough, 2 Maule & Selw. 19; Marryatts *v.* White, 2 Starkie, R. 101; Peters *v.* Anderson, 5 Taunt. R. 596; Bosanquet *v.* Wray, 6 Taunt. R. 597; Shaw *v.* Picton, 4 Barn. & Cressw. 715. See an elaborate article on the question of the Appropriation of Payments in the American Law Magazine, (Philadelphia.) No. 1, for April, 1813, p. 31 to 52. See also 1 American Lead. Cas. 123, and notes.

where a change of the firm has occurred by a dissolution by death or otherwise, the rule is, that the estate of the deceased or retiring partner is liable only to the extent of the balance due to any creditor at the time of the dissolution; and that if the creditor continues to keep a running account with the survivors, or the new firm, and sums are paid to them by the creditor, and sums are drawn on their firm, and paid by them, and are charged and credited to the general account, and blended together as a common fund, without any distinction between the sums due to the creditor by the old firm and the new; in such a case, the sums paid to the creditor are deemed to be paid upon the general blended account, and go to extinguish, *pro tanto*, the balance of the old firm, in the order of the earliest items thereof. "In such a case," (it has been said by a very able judge,) "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance, due on a given day, has or has not, been discharged, but by examining, whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head, instead of the foot of it. A man's

banker breaks, owing him, on the whole account, a balance of £1,000. It would surprise one to hear the customer say: 'I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1,000 which I paid in five years ago, that I hold myself never to have drawn out; and, therefore, if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say, that it is that specific sum which is still due to me, and not the £1,000 that I paid in last week.'"[1]

§ 459 *f*. On the other hand, if, under the like circumstances, moneys have been received by the new firm, and drawn out by the creditor from time to time, and upon the whole, the original balance due to the creditor has been increased, but never at any time been diminished, in the hands of the firm; in such a case, the items of payment made by the new firm, are still to be applied to the extinguishment of the balance of the old firm, and will discharge the share of the deceased or retiring partner to that extent, but no farther; for, in such a case, the general rule as to running accounts is applied with its full force.[2] *A fortiori*, where payments have been made, and no new sums have been deposited by the creditor with the new firm, the payments will be applied in extinguishment, *pro tanto*, of the

[1] Sir William Grant, in Clayton's case, 1 Meriv. R. 608, 609; Johne's case, 1 Meriv. R. 619; Smith *v.* Wigley, 3 Moore & Scott, 174; Sterndale *v.* Hankinson, 1 Simons, R. 393; Bodenham *v.* Purchase, 2 Barn. & Ald. 39; Pemberton *v.* Oakes, 4 Russ. R. 154; Bank of Scotland *v.* Christie, 8 Clark & Finnell. R. 214, 227, 228.

[2] Palmer's case, 1 Meriv. R. 623, 624; Sleech's case, 1 Meriv. R. 538; Bodenham *v.* Purchase, 2 Barn. & Ald. 39. See In Re Mason, 3 Mont. Deac. & De Gex, R. 490; Law Magazine, May, 1845, p. 184.

balance due by the old firm, in the order of the items thereof.[1]

§ 459 *g*. The cases which we have hitherto been considering, are cases of running accounts; and, under such circumstances, the rule will apply equally to cases where a part of the debt is secured by a guaranty or by sureties as well as where there are no such parties.[2] But, where there are no such running accounts, if no special appropriation is made by the debtor, the creditor may, as we have seen,[3] apply the money to any demand which he has against the debtor, whether it be a balance of an old account, or of a new account; for, in such a case the interest of third persons is not concerned, and the case of running accounts constitutes, as it were, an implied appropriation by the parties to the account generally.[4] And payments made generally by a debtor to his creditor, may be applied by the

[1] Sleech's case, 1 Meriv. R. 538, &c.

[2] United States *v.* Kirkpatrick, 9 Wheat. R. 720, 737, 738; United States *v.* Wardwell, 5 Mason, R. 82, 87; Postmaster-General *v.* Furber, 4 Mason, R. 333, 335. But see United States *v.* Eckford's Ex'ors, 1 Howard, Sup. Ct. R. 250; S. C. 17 Peters, R. 251; United States *v.* January, 7 Cranch, 572.

[3] Ante, § 459 *a*.

[4] Lysaght *v.* Walker, 5 Bligh, R. (N. S.) 1, 28; Bosanquet *v.* Wray, 6 Taunt. R. 597; Brooke *v.* Enderby, 2 Brod. & Bing. R. 70. In United States *v.* January, 7 Cranch, R. 572, it seems to have been thought by a majority of the Court, "That the rule adopted in ordinary cases is not applicable to a case where different sureties under different obligators are in interest." But that case was one of a public officer, who had given bonds at different times. The case was very obscurely reported; but its true bearing is stated in a note to United States *v.* Wardwell, 5 Mason, R. 87. It is true, that the case of United States *v.* January has been recognized as good law in United States *v.* Eckford's Ex'ors, 1 How. Sup. Ct. R. 250, 261. But there were peculiar circumstances in this last case; and United States *v.* Kirkpatrick expressly recognizes the general doctrine of appropriation.

creditor to a balance due to the creditor, although other debts have since been incurred, upon which the debtor has given a bond, with a surety, for security thereof.[1] By the Scotch Law, a creditor, having several debts due from the same debtor, has a right to ascribe a payment made indefinitely and without appropriation by his debtor, to whichever debt he may see fit to apply it, and is entitled to make this appropriation and election even at the latest hour.[2] The rule of our law seems (as we have seen) more qualified, and to omit the right of election of the creditor to a reasonable period after the payment, or to cases where the appropriation may be presumed to be indifferent to the debtor.[3]

§ 460. In cases of account, not founded in any such privity of contract, but founded upon relations and duties required by law, or upon torts and constructive trust, for which equitable redress is sought, it is more difficult to trace out a distinct line, where the legal remedy ends, and the equitable jurisdiction begins.

§ 461. In our subsequent examination of this branch of jurisdiction, it certainly would not be going beyond its just boundaries, to include within it all subjects, which arise from the two great sources already indicated, and terminate in matters of account, namely, first, such as have their foundation in contract, or *quasi* contract, and, secondly, such as have their foundation in trusts, actual or constructive, or in torts affecting

[1] Kirby *v.* Duke of Marlborough, 2 M. & Selw. 18; Williams *v.* Rawlinson, 3 Bing. R. 71; Parr *v.* Howlin, 1 Alc. & Nap. 197.

[2] Campbell *v.* Dant, 2 Moore, Priv. Coun. R. 292. See Moss *v.* Adams, 4 Iredell, Eq. R. 42.

[3] Ante, § 459 *b*, § 459 *a*. See Caldwell *v.* Wentworth, 14 New Hamp. 431.

property. But, as many cases included under one head are often connected with principles belonging to the other, and as the jurisdiction of Courts of Equity is often exercised upon various grounds, not completely embraced in either; or upon mixed considerations; it will be more convenient, and perhaps not less philosophical, to treat the various topics under their own appropriate heads, without any nice discrimination between them. We may thus bring together in this place such topics only, as do not seem to belong to more enlarged subjects, or such as do not require any elaborate discussion, or such as peculiarly furnish matter of illustration of the general principles which regulate the jurisdiction.

§ 462. Let us, then, in the first place bring together some cases arising *ex contractu*, or *quasi ex contractu*, and involving accounts. And here, one of the most general heads is that of AGENCY, where one person is employed to transact the business of another for a recompense or compensation. The most important agencies of this sort which fall under the cognizance of Courts of Equity, are those of Attorneys, Factors, Bailiffs, Consignees, Receivers, and Stewards.[1] In most agen-

[1] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 518 to 515. — In general, a bill will not lie by an agent against his principal, for an account, unless some special ground is laid; as the incapacity to get proof, unless by discovery; Dinwiddie *v.* Bailey, (6 Ves. 136.) But in the case of stewards, a discovery from his principal is ordinarily necessary, for the reasons stated by Lord Eldon in the same case, (6 Ves. 141.) "The nature of this dealing is, that money is paid in confidence, without vouchers, embracing a great variety of accounts with the tenants; and nine times in ten, it is impossible that justice be done to the steward," without going into Equity for an account against his principal. See Middleditch *v.* Sharland, 5 Ves. 87; Moses *v.* Lewis, 12 Price, R. 502. In this last case the Court reused to entertain jurisdiction for an account, it appearing that the whole

cies of this sort, there are mutual accounts between the parties; or, if the account is on one side, as the relation naturally gives rise to great personal confidence between the parties, it rarely happens that the principal is able, in cases of controversy, to establish his rights, or to ascertain the true state of the accounts, without resorting to a discovery from the agent. Indeed, in cases of factorage and consignments, and general receipts and disbursements of money by receivers and stewards, it can scarcely be possible, if the relation has long subsisted, that very intricate and perplexing accounts should not have arisen, where, independently of a discovery, the remedy of the principal would be utterly nugatory, or grossly defective. It would be rare, that specific sales and purchases, and the charges growing out of them, could be ascertained and traced out with any reasonable certainty; and still more rare, that every receipt and disbursement could be verified by direct and positive evidence. The rules of law in all such agencies require that the agent should keep regular accounts of all his transactions, with suitable vouchers.[1] And it is obvious, that if he can suppress all means of access to his books of account and vouchers, the principal would be utterly without redress, except by the searching power of a bill of discovery, and the close inspection of all books, under the authority and guidance of a Master in Chan-

matter was a set-off or other defence at law. The Court admitted the general jurisdiction of Courts of Equity in matters of account; but denied that it was applicable to cases of this sort. Id. 510. See also Frietas *v.* Don Santos, 1 Y. & Jerv. 574.

[1] Pearce *v.* Green, 1 Jac. & Walk. 135; Ormond *v.* Hutchinson, 13 Ves. 53; Clarke *v.* Tipping, 9 Beavan, R. 284.

cery. Besides; agents are not only responsible for a due account of all the property of their principals, but also for all profits which they have clandestinely obtained by any improper use of that property. And the only adequate means of reaching such profits must be by such a bill of discovery.[1] In cases of fraud, also, it is almost impracticable to thread all the intricacies of its combinations, except by searching the conscience of the party, and examining his books and vouchers; neither of which can be done by the Courts of Common Law.[2]

§ 463. In agencies also of a single nature, such as a single consignment, or the delivery of money to be laid out in the purchase of an estate, or of a cargo of goods, or to be paid over to a third person, although a suit at law may be often maintainable;[3] yet, if the thing lie in privity of contract and personal confidence, the aid of a Court of Equity is often indispensable for the attainment of justice. Even when not indispensable, it may often be exceedingly convenient and effectual, and prevent a multiplicity of suits. The party in such cases often has an election of remedy. This doctrine was expounded with great clearness and force by Lord Chief Justice Willes, in delivering the opinion of the Court in a celebrated case. Speaking of the propriety of sometimes resorting to a suit at law, he said: "Though a bill in Equity may be proper in several of these cases, yet an action at law will lie likewise. As

[1] East India Company *v.* Henchman, 1 Ves. jr. 289; Massey *v.* Davies, 2 Ves. jr., R. 318; Borr *v.* Vandall, 1 Ch. Cas. 30.

[2] Earl of Hardwicke *v.* Vernon, 14 Ves. 510.

[3] But see Navulshaw *v.* Brownrigg, 7 Eng. Law & Eq. R. 106; Coquillard *v.* Suydam, 8 Blackf. 24.

if I pay money to another, to lay out in the purchase of a particular estate, or any other thing, I may either bring a bill against him, considering him as a trustee, and praying that he may lay out the money in that specific thing; or I may bring an action against him, as for so much money had and received for my use. Courts of Equity always retain such bills, when they are brought under the notion of a trust; and therefore, in this very case, (a consignment to a factor for sale,) they have often given relief, where the party might have had his remedy at law, if he had thought proper to proceed in that way."[1]

§ 464. Perhaps the doctrine here laid down, although generally true, is a little too broadly stated. The true source of jurisdiction in such cases, is not the mere notion of a virtual trust; for then Equity Jurisdiction would cover every case of bailment. But it is the necessity of reaching the facts by a discovery; and having jurisdiction for such a purpose, the Court, to avoid multiplicity of suits, will proceed to administer the proper relief.[2] And hence it is that in the case of a single consignment to a factory for sale, a Court of Equity will, under the head of discovery, entertain the suit for relief, as well as discovery; there being accounts and disbursements involved, which, generally speaking, cannot be so thoroughly investigated at law,[3] although (as we have seen) a Court of Equity is cautious of en-

[1] Scott *v.* Surman, Willes, R. 405.

[2] Ante, § 71; 3 Black. Comm. 437; Ludlow *v.* Simond, 2 Cain. Cas. in Err. 1, 38, 52; Mackenzie *v.* Johnston, 4 Madd. R. 374; Pearce *v.* Green, 1 Jac. & Walk. 135.

[3] Ludlow *v.* Simond, 2 Cain. Err. 1, 38, 52; Post *v.* Kimberly, 9 Johns. R. 493; Mackenzie *v.* Johnston, 4 Madd. R. 374.

tertaining suits upon a single transaction, where there are not mutual accounts.[1] Nay, so far has the doctrine been carried, that even though the case may appear, as a matter of account, to be perfectly remediable at law; yet if the parties have gone on to a hearing of the merits of the cause, without any preliminary objection being taken to the jurisdiction of the Court upon this ground, the Court will not then suffer it to prevail; but will administer suitable relief.[2]

§ 465. Cases of account between trustees and *cestuis que trust* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of Courts of Equity.[3] The same general rules apply here, as in other cases of agency. A trustee is never permitted to make any profit to himself in any of the concerns of his trust.[4] On the other hand, he is not

[1] Porter *v.* Spencer, 2 Johns. Ch. R. 171; Wells *v.* Cooper, cited 6 Ves. 136; Ante, § 458. But see Coquillard *v.* Suydam, 8 Blackf. 25.

[2] Post *v.* Kimberly, 9 Johns. R. 493.

[3] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 522, 523.

[4] Docker *v.* Somes, 2 Mylne & Keen, 664. — In this case it was decided, that if a trustee mixes trust funds with his private moneys, and employs both in a trade or adventure of his own, the *cestui que trust* may, if he prefers it, insist upon having a proportionate share of the profits, instead of interest on the amount of the trust funds so employed. On this occasion Lord Brougham delivered an elaborate judgment, from which I have made the following extracts, as they strikingly exemplify the doctrine of the text. His Lordship said: "Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go, not to the trustee, who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner, (and cases of this kind are more numerous,) where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself; yet, for every farthing of profit he may make, he shall be accountable to the

liable for any loss which occurs in the discharge of his

trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure, or from the concern. In all these cases, it is easy to tell what the gains are; the fund is kept distinct from the trustee's other moneys, and whatever he gets he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property, and go to the proprietor. So it is also, where one, not expressly a trustee, has bought or trafficked with another's money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable. If a person has purchased land in his own name with my money, there is a resulting trust for me; if he has invested my money in any other speculation, without my consent, he is held a trustee for my benefit. And so an attorney, guardian, or other person, standing in a like situation to another, gains not for himself, but for the client, or infant, or other party, whose confidence has been abused. Such being the undeniable principle of Equity, such the rule by which breach of trust is discouraged and punished, — discouraged by intercepting its gains, and thus frustrating the intentions that caused it; punished, by charging all losses on the wrong-doer, while no profit can ever accrue to him, — can the Court consistently draw the line as the cases would seem to draw it, and except from the general rule those instances where the risk of the malversation is most imminent; those instances where the trustee is most likely to misappropriate; namely, those in which he uses the trust funds in his own traffic? At first sight this seems grossly absurd, and some reflection is required, to understand how the Court could ever, even in appearance, countenance such an anomaly. The reason which has induced judges to be satisfied with allowing interest only, I take to have been this. They could not easily sever the profits, attributable to the trust money, from those belonging to the whole capital stock; and the process became still more difficult where a great proportion of the gains proceeded from skill or labor employed upon the capital. In cases of separate appropriation there was no such difficulty; as, where land or stock had been bought, and then sold again at a profit. And here, accordingly, there was no hesitation in at once making the trustee account for the whole gains he had made. But where, having engaged in some trade himself, he had invested the trust money in that trade along with his own, there was so much difficulty in severing the profits which might be supposed to come from the money misapplied from those which

duties, unless he has been guilty of negligence, mal-

came from the rest of the capital embarked, that it was deemed more convenient to take another course, and instead of endeavoring to ascertain what profit had been really made, to fix upon certain rates of interest, as the supposed measure or representative of the profits, and assign that to the trust estate. • This principle is undoubtedly attended with one advantage; it avoids the necessity of an investigation, of more or less nicety, in each individual case, and it thus attains one of the important benefits resulting from all general rules. But mark what sacrifices of justice and expediency are made for this convenience. All trust estates receive the same compensation, whatever risks they may have run during the period of their misappropriation; all profit equally, whatever may be the real gain derived by the trustee from this breach of duty: nor can any amount of profit made be reached by the Court, or even the most moderate rate of mercantile profit, that is the legal rate of interest, be exceeded, whatever the actual gains may have been, unless by the very clumsy and arbitrary method of allowing rests, in other words compound interest; and this without the least regard to the profits actually realized. For, in the most remarkable case in which this method has been resorted to, Raphael *v.* Boehm, (which, indeed, is always cited to be doubted, if not disapproved,) the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it. But the principal objection which I have to the rule, is founded upon its tendency to cripple the just power of this Court, in by far the most wholesome, and indeed, necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust. What avails it towards preventing such malversations, that the contrivers of sordid injustice feel the power of the Court only, where they are clumsy enough to keep the gains of their dishonesty severed from the rest of their stores? It is in vain they are told of the Court's arm being long enough to reach them, and strong enough to to hold them, if they know that a certain delicacy of touch is required, without which the hand might as well be paralyzed or shrunk up. The distinction, I will not say sanctioned, but pointed at, by the negative authority of the cases, proclaims to executors and trustees, that they have only to invest the trust money in the speculations, and expose it to the hazards of their own commerce, and be charged 5 per cent. on it; and then they may pocket 15 or 20 per cent. by a successful adventure. Surely, the supposed difficulty of ascertaining the real gain made by the misapplication is as nothing, compared with the mischiefs, likely to arise from admitting this rule, or rather this exception to one of the most general rules of equitable jurisdiction. Even if cases were more likely to occur than I can think they are, of inextricable difficulties in pursuing such inquiries, I

versation, or fraud.[1] The same doctrine is applicable to cases of guardians and wards, and other relations of a similar nature.[2]

§ 466. Cases of account between tenants in common, between joint-tenants, between partners, between part-owners of ships, and between owners of ships and the masters, fall under the like considerations. They all involve peculiar agencies, like those of bailiffs, or managers of property, and require the same operative power of discovery, and the same interposition of Equity.[3] Indeed, in all cases of such joint interests, where one party receives all the profits, he is bound to

should still deem this the lesser evil by far, and be prepared to embrace it. Mr. Solicitor General put a case of a very plausible aspect, with the view of deterring the Court from taking the course which all principle points out. He feigned the instance of an apothecary buying drugs with £100 of trust money, and earning £1,000 a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel or skein of silk, and these being worked up into goods of the finest fabric, *Birmingham* trinkets or *Brussels* lace, where the work exceeds by 10,000 times the material in value. But such instances, in truth, prove nothing, for they are cases not of profits upon stock, but of skilful labor very highly paid; and no reasonable person would ever dream of charging a trustee whose skill thus bestowed, had so enormously augmented the value of the capital, as if he had only obtained from it a profit; although the refinements of the Civil Law would certainly bear us out, even in charging all gains accruing upon those goods, as in the nature of accretions belonging to the true owners of the chattels." See Wedderburn *v.* Wedderburn, 4 Mylne & Craig, 41; Clarke *v.* Tipping, 9 Beavan, R. 284.

[1] Wilkinson *v.* Stafford, 1 Ves. jr. 32, 41, 42; Shepherd *v.* Towgood, 1 Turn. & R. 379; Adair *v.* Shaw, 1 Sch. & Lefr. R. 272; Caffrey *v.* Darbey, 6 Ves. 488.

[2] See Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 543, 544, 545; Id. p. 522, 523.

[3] See Abbott on Shipp. B. 1, ch. 3, § 4, 10, 11, 12; Doddington *v.* Hallett, 1 Ves. 497; Ex parte Young, 2 Ves. & Beam. 242; Com. Dig. Chan. 3 V. 6, 2 A. 1; Drury *v.* Drury, 1 Ch. Rep. 49; Strelly *v.* Winson, 1 Vern. R. 297.

account to the other parties in interest for their respective shares, deducting the proper charges and expenses; whether he acts expressly by their authority as bailiff, or only by implication as manager, without dissent, *jure domini*, over the property.[1]

§ 466 *a*. Trustees, directors of private companies, and other persons standing in a similar situation, are not only not allowed to make any profit out of their offices, but it is *primâ facie* a breach of trust on their part to take upon themselves the management of any part of the concern for a compensation or profit, by way of commission, or brokerage, or salary. Thus, for example, a director of a company created to employ steamships for the benefit of the company, cannot assume to himself, with the consent of the other directors, the situation of a ship's husband, so as to charge the ship's company for such a compensation, as a stranger acting in the same office might.[2]

[1] Strelly *v.* Winson, 1 Vern. 297; Horn *v.* Gilpin, Ambl. R. 255; Pulteney *v.* Warren, 6 Ves. 73, 78.

[2] Benson *v.* Heathorn, 1 Younge & Coll. N. R. 326, 340, 341. — In this case Mr. Vice-Chancellor Knight said: "The next point relates to the commissions and the discounts. It may be right, and probably is fair, to assume, for the purpose of the argument, that all these charges and allowances to Mr. Heathorn were such as would have been according to usage, and proper in the case of a stranger. His position, however, was very different. He was one of six directors of this Company, to whom exclusively the entire management of its affairs was intrusted. I say exclusively, because, as is obviously necessary in companies of this description, the shareholders in general were prohibited from interfering. These six directors, being so intrusted, receive among them, from the funds of the Company, as a remuneration for their trouble in being the exclusively acting partners in this concern, a sum of no less than £650 per annum, capable, as I read the deed, of increase, but not liable to diminution; this sum they are to divide between themselves as they think fit. Now, it is obvious that persons so circumstanced were under an obligation to the shareholders at large to use their best exertions in

§ 467. In many cases of frauds by an agent, a Court of Common Law cannot administer effectual remedies;

all matters which related to the affairs of the Company for the welfare of the concern thus entrusted, not gratuitously, to their charge. I apprehend that, without any special provision for the purpose, it was by law an implied and inherent term in the engagement, that they should not make any other profit to themselves of that trust or employment, and should not acquire to themselves, while they remained directors, an interest adverse to their duty. The main or only business of this Company consisted in acquiring, managing, and working steam-vessels. It may have been that a ship's husband was necessary. It is the defendant's case, or the case at least of Mr. Heathorn, that a ship's husband was necessary. This is denied on the part of the plaintiffs, who say that the directors might very well have performed such duty as the management of the vessels required without the interposition of a ship's husband. On that I gave no opinion; but if a ship's husband was necessary, it is obvious he would become the responsible servant of the directors, in an onerous office — that he would become an accounting party to them, and that his conduct, as well as his accounts, however respectable he might be, would require a constant and vigilant superintendence and control. That constant and vigilant superintendence and control one and all of the directors had, for value, contracted to give; and what is done? One of these very directors becomes himself the person whose conduct and accounts it is his duty to superintend, to check, and to watch; at once, therefore, to put the case at the very lowest, and in a manner most favorable to Mr. Heathorn, paralyzing him as director in this respect, and leaving the Company, as far as these important matters were concerned, under the protection of but five, while they believed themselves to be under the protection of six. But it does not rest there. The five remaining directors were placed in the difficult and invidious position of having to check and control the accounts of one of their own body, with whom they were associated on equal terms, in the management of every other part of the affairs of the concern. It has been, nevertheless, with an appearance of seriousness, treated as an arguable question, whether I can allow this gentleman to receive profits, however reasonable in amount, if they had been claimed by another person, which he has made by this employment, in which he ought never to have embarked. If the Court were to do so, if the Court were to allow to a person so circumstanced that which might fairly be allowed to a stranger, it would obviously afford the strongest encouragement to a departure from what is the right and regular course in every similar establishment. A party would take a situation of this nature with the certainty of having a fair remuneration, and with the probable advantage of retaining what was unfair. It

as, for instance, it cannot give damages against his estate for a loss arising from his torts, when such torts die with the person; and, *à fortiori*, the rule will apply to Courts of Equity, which do not entertain suits for damages. But, where the tort arises, in the course of an agency, from a fraud of the agent, and respects property, Courts of Equity will treat the loss sustained, as a debt against his estate.[1]

is mainly this danger, the danger of the commission of fraud in a manner and under circumstances which, in the great majority of instances, must preclude detection, that in the case of trustees and all parties whose character and responsibilities are similar, (for there is no magic in the word,) induces the Court (not only for the sake of justice in the individual case, but for the protection of the public generally, and with a view to assert and vindicate the obligation of plain and direct dealing between man and man in all cases, but especially in those where one man is trusted by another,) to adhere strictly to the rule, that no profit of any description shall be made by a person so circumstanced — saying, to the person complaining, that he has thus employed his time and skill without remuneration, that he has elected so to treat the matter; that he has had his reward, for he has had the possibility, nay the probability, of retaining to himself that which he never ought to have retained; that he has been willing to run the risk, and cannot complain if he happens to lose the stake. It is on this principle that Lord Eldon proceeded in the cases so familiar to us all of purchases by trustees. It is only an instance of the application of the rule, not the rule itself. In those cases Lord Eldon said — (I allude particularly to Ex parte Lacey, 6 Ves. 627, which occurred soon after Lord Eldon first received the seal) — 'The rule is founded on this, that, though you may see in a particular case that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties in ninety-nine cases out of a hundred, whether he has made advantage or not.' If, in the present case, Mr. Heathorn had openly and directly brought forward the matter before the body of shareholders generally, I consider it possible, if not probable, that he would have been allowed to receive, and would now have been entitled to retain all the sums in question paid for commission. He has not elected to take that open and straightforward course; he has chosen that the matter should be undisclosed, and he must abide the inevitable result."

[1] Lord Hardwicke *v.* Vernon, 4 Ves. 418; Bishop of Winchester *v.* Knight, 1 P. Will. 406. But see Jesus College *v.* Bloom, Ambler, R.

§ 468. Courts of Equity adopt very enlarged views in regard to the rights and duties of agents; and in all cases, where the duty of keeping regular accounts and vouchers is imposed upon them, they will take care that the omission to do so shall not be used as a means of escaping responsibility, or of obtaining undue recompense. If, therefore, an agent does not, under such circumstances, keep regular accounts and vouchers, he will not be allowed the compensation, which otherwise would belong to his agency.[1] Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own, the whole will be taken, both at Law and in Equity to be the property of the principal, until the agent puts the subject-matter under such circumstances that it may be distinguished, as satisfactorily as it might have been before the unauthorized mixture on his part.[2] In other words the agent is put to the necessity of showing clearly what part of the property belongs to him; and, so far as he is unable to do this, it is treated as the property of his principal.[3] Courts of Equity do not in these cases proceed upon the notion, that strict justice is done between the parties; but upon the ground that it is the only justice that can be

55. — In many cases of tort, a remedy would lie at law against the personal representative of the party; as, for instance, where a tenant has tortiously dug ore, and sold it during his lifetime; if the ore, or the proceeds of it come to the possession of his administrator or executor, or he has assets, a suit will lie at law for the same. 1 P. Will. 407. See Jesus College *v.* Bloom, Ambler, R. 54; Hambley *v.* Trott, Cowp. R. 374.

1 White *v.* Lady Lincoln, 8 Ves. 363; S. P. 15 Ves. 441.

2 Lufton *v.* White, 15 Ves. 436, 440.

3 Panton *v.* Panton, cited 15 Ves. 440; Chadsworth *v.* Edwards, 8 Ves. 46.

done; and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of his principal.[1]

§ 469. Another head is that of APPORTIONMENT, CONTRIBUTION, and GENERAL AVERAGE, which are in some measure blended together, and require, and terminate in Accounts. In most of these cases, a discovery is indispensable for the purposes of justice; and where this does not occur, there are other distinct grounds for the exercise of Equity Jurisdiction, in order to avoid circuity and multiplicity of actions. Some cases of this nature spring from contract; others, again, from a legal duty, independent of contract; and others, again, from the principles of natural justice, confirming the known maxim of the law, *Qui sentit commodum, sentire debit et onus.* The two latter may, therefore, properly be classed among obligations resulting *quasi ex contractu.*[2] This will abundantly appear in the sequel of these Commentaries.[3]

[1] Lufton *v.* White, 15 Ves. 441; Post, § 623.

[2] Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; S. C. 2 Bos. & Pul. 270. See 1 White & Tudor's Eq. Lead. Cas. 60, and notes.

[3] Mr. Chancellor Kent has, in several of his judgments, treated the subject of contribution, and insisted strongly that it is not necessarily founded upon contract, but upon principles of natural justice, independent of contract. See Cheeseborough *v.* Millard, 1 Johns. Ch. R. 409; Stearns *v.* Cooper, 1 Johns. Ch. R. 425; Campbell *v.* Mesier, 4 Johns. C. R. 334. In this opinion he is not only fully borne out by the doctrines of the English Law, (Deering *v.* Earl of Winchelsea, 1 Cox, R. 318; S. C. 2 Bos. & Pul. 270,) but by the Roman and Foreign Law, which he has, with his usual ability and learning, commented upon. And he has applied it to the case of an old party wall which divided two estates, and was necessary to be rebuilt, and was rebuilt by the owner of one, who claimed contribution from the other, and had a decree in his favor. There is a most persuasive course of reasoning used to support this judgment; but it is mainly rested upon principles of Equity, derived from the Civil

§ 470. And first as to APPORTIONMENT and CONTRIBUTION, which may conveniently be treated together. Lord Coke has remarked that the word Apportionment "cometh of the word *Portio, quasi Partio,* which signifieth a part of the whole, and apportion signifieth a division of a rent, common, &c., or a making of it into parts."[1] It is sometimes used to dénote the distribution of a common fund, or entire subject among all those who have a title to a portion of it.[2] Sometimes, indeed, in a more loose but an analogous sense, it is used to denote the contribution, which is to be made by different persons, having distinct rights, towards the discharge of a common burthen or charge to be borne by all of them. In respect, then, to apportionment in its application to contracts in general, it is the known and familiar principle of the Common Law, that an entire contract is not apportionable. The reason seems to be, that as the contract is founded upon a consideration dependent upon the entire performance of the act, and if from any cause it is not wholly performed, the *casus fœderis* does not arise, and the law will not make provisions for exigencies which the parties have neglected to provide for themselves. Under such circumstances, it is deemed wholly immaterial to the rights of the other party, whether the non-performance has arisen from the design or negligence of the party bound to perform it, or to inevitable casualty or accident. In each case the contract has not been completely executed.[3] The same rule is applied to cases

and Foreign Law. See Campbell *v.* Mesier, 4 Johns. Ch. R. 334; S. C. 6 Johns. R. 21.

[1] Co. Litt. 147 *b.*

[2] Ex parte Smyth, 1 Swanst. R. 338, 339, the Reporter's note.

[3] Paradine *v.* Jane, Aleyn, R. 26, 27; Story on Bailments, § 36; Ex

where the payment is to be made under a contract upon the occurrence of a certain event or upon certain conditions. In the application of this doctrine of the Common Law, Courts of Equity have generally, but not universally, adopted the maxim, *Æquitas sequitur legem.*[1] Whether rightly or wrongly, it is now too late to inquire, although as a new question, there is much doubt whether in so adopting the maxim, they have not in many cases, deserted the principles of natural justice and equity, as well as the analogies by which they were governed in other instances in which they have granted relief.[2] We have already had occasion to cite cases in which this rigid doctrine as to non-apportionment has been applied.[3] There are, however, some exceptions to the rule both at Law and in Equity, which we shall presently have occasion to consider, and some in which Courts of Equity have granted relief, where it would at least be denied at Law.[4]

§ 471. Some cases of apportionment in Equity, arising under contract, or *quasi* contract, have already been mentioned under the head of Accident.[5] But at the Common Law, the cases are few in which an apportionment under contracts is allowed, the general doctrine being against it, unless specially stipulated by the parties. Thus, for instance, where a person was appointed collector of rents for another, and was to receive £100 per annum for his services; and he died

parte Smyth, 1 Swanst. 338, 339, the Reporter's note, and cases cited; Ibid. 1 Fonbl. Eq. B. 1, ch. 5, § 9, notes (*m*) to (*r*).

[1] Post, § 474, 480 to 483.

[2] Ibid.

[3] Ante, § 101 to 104.

[4] Post, § 472, 473, 479.

[5] Ante, § 93.

at the end of three quarters of the year, while in the service; it was held, that his executor could not recover £75 for the three quarters' service, upon the ground that the contract was entire, and there could be no apportionment; for the maxim of the law is, *Annua nec debitum judex non separat ipsum.*[1] So, where the mate of a ship engaged for a voyage at 30 guineas for the voyage, and died during the voyage, it was held, that at law there could be no apportionment of the wages.[2]

§ 471 *a.* "In its familiar practical applications, the principle that an entire contract cannot be apportioned, seems founded on reasoning of this nature; that the subject of the contract being a complex event constituted by the performance of various acts, the imperfect completion of the event, by the performance of some only of those acts, (as service during a portion of the specified period, navigation to an extent less than the voyage undertaken) cannot, by virtue of that contract of which it is not the subject, afford a title to the whole or to any part of the stipulated benefit. Whatever be the origin or the policy of the principle, it has, unquestionably, been established as a general rule, from the earliest period of our judicial history.[3]

[1] Co. Litt. 150 *a*; Countess of Plymouth *v.* Throgmorton, 1 Salk. 65; 3 Mod. R. 153.

[2] Cutter *v.* Powell, 6 T. R. 350. See, also, Appleby *v.* Dodd, 8 East, R. 300; Jesse *v.* Roy, 1 Cromp. Jerv. & Rosc. 316, 329, 339.

[3] Ex parte Smyth, 1 Swanst. R. p. 338, note. "The following are some of the authorities by which it is enforced or qualified. Bro. Abr. Apportion, pl. 7, 13, 22, 26; Id. Contract, pl. 8, 16, 30, 31, 35; Id. Laborers, pl. 48, 10 H. 6, 23; 3 Vin. Abr. 8, 9; Finch Law, lib. 2, c. 18; Countess of Plymouth *v.* Throgmorton, 1 Salk. 65; Tyrie *v.* Fletcher, Cowp. 666; Robinson *v.* Bland, 2 Burr. 1077, 1 Bl. 234; Loraine *v.* Thomlinson,

§ 472. Courts of Equity, to a considerable extent, act, as we have seen, upon this maxim of the Common Law in regard to contracts. But, where equitable circumstances intervene, they will grant redress. Thus, if an apprentice fee of a specific sum be given, and the master afterwards becomes bankrupt, Equity will (as we have seen) decree an apportionment.[1] So, where an attorney, while he lay ill, received the sum of 120 guineas for a clerk who was placed with him, and he died within three weeks afterwards, the Court decreed a return of 100 guineas, notwithstanding the articles provided, that, in case of the attorney's death, £60 only should be returned.[2] This case, upon the statement in the report, is certainly open to the objection taken to it by Lord Kenyon, who said that it carried the jurisdiction of the Court as far as it could be;[3] for it overturned the maxim, *Modus et conventio vincunt legem.* But, in truth, the case (according to the Register's Book) seems to have been very correctly decided; for in the pleadings it was stated, that the plaintiff at the time was unwilling to sign the articles, or to pay the 120

Doug. 585; Bermon *v.* Woodbridge, Doug. 781; Rothwell *v.* Cook, 1 B. & P. 172; Meyer *v.* Gregson, Marsh. on Insurance, 658; Chater *v.* Becket, 7 T. R. 201; Cook *v.* Jennings, 7 T. R. 381; Cuttler *v.* Powell, 6 T. R. 320; Wiggins *v.* Ingleton, Lord Raym. 1211; Cook *v.* Tombs, 2 Anstr. 420; Lea *v.* Barber, 2 Anstr. 425, *n*; Mulloy *v.* Backer, 5 East, 316; Liddard *v.* Lopes, 10 East, 526; How *v.* Synge, 15 East, 440; Fuller *v.* Abbott, 4 Taunt. 105; Stevenson *v.* Snow, 3 Burr. 1237; Long *v.* Allen, Marsh. on Insurance, 460; Park on Insurance, 529; Ritchie *v.* Atkinson, 10 East, 295; Waddington *v.* Oliver, 2 N. R. 61; and see Abbott's Law of Merchant Ships, p. 292, et seq.

[1] Ante, § 93; Hale *v.* Webb, 2 Bro. Ch. R. 78; Ex parte Sandby, 1 Atk. 149; Hirst. *v.* Tolson, 13 Jurist. 596.

[2] Newton *v.* Rowse, 1 Vern. 460, and Raithby's note (2).

[3] Hale *v.* Webb, 2 Bro. Ch. R. 80; 1 Fonbl. Eq. B. 1, ch. 5, § 8, note (*g*).

guineas, until the attorney had declared, that in case he should not live to go abroad, the 120 guineas should be returned to him, and, that he was only troubled with a cold, and hoped to be abroad in two or three days; and thereupon the plaintiff signed the articles.[1] This allegation was, in all probability, proved, and was the very turning point of the case. If so, the case stands upon a plain ground of Equity, that of mutual mistake, or misrepresentation, or unconscientious advantage.

§ 473. Other cases of apprentice fees may exemplify the same salutary interposition of Courts of Equity. Thus, where an apprentice had been discharged from service, in consequence of the misconduct of the master, it was decreed that the indentures of apprenticeship should be delivered up, and a part of the apprentice fee paid back.[2] So, where the master undertook, in consideration of the apprentice fee, to do certain acts during the apprenticeship, which by his death were left undone and could not be performed, an apportionment of the apprentice fee was decreed.[3]

§ 474. These are cases where an apportionment might not always be reached at the Common Law; but yet, which belong to the recognized principles of Equity. But, on the other hand, where an apprentice fee has been paid, and the apprenticeship has been dissolved at the request of the friends of the apprentice, but without any default in the master, and without any agreement for a return of any part of the fee, there a Court of Equity will not interfere, for there is no Equity

[1] Mr. Raithby's note to 1 Vern. 460. Ante, § 93.

[2] Lockley *v.* Eldridge, Rep. Temp. Finch, 128. See Therman *v.* Abel, 2 Vern. 64.

[3] Savin *v.* Bowdin. Rep. Temp. Finch, 396.

attaching itself to the transaction, and the contract does not import any return.[1]

§ 475. In regard to rents the general rule at the Common Law leaned strongly against any apportionment thereof. Hence it was well established, that in case of the death of a tenant for life, in the interval between two periods, at each of which a portion of rent becomes due from the lessee, no rent could be recovered for the occupation since the first of those periods.[2] The rule seems to have been rested on two propositions: 1st. That the entire contract cannot be apportioned. 2d. That under a lease with a periodical reservation of rent, the contract for the payment of such portion is distinct and entire.[3] Hence it followed, that on the determination of a lease by the death of the lessor before the day appointed for payment of the rent, the event, on the completion of which the payment was stipulated, namely, occupation of the lands during the period stipulated, never occurring, no rent became payable, and in respect of time, apportionment was not in any case permitted.[4]

§ 475 *a*. Some exceptions and some qualifications were, however, in certain cases and under certain circumstances, incorporated into the Common Law at an early period, in respect to rent growing out of real estate, where there was a division or severance of the land from which the rent issued. In other cases, the rent was held to be wholly extinguished. A few examples of each sort may perhaps be usefully introduced in this place; but the full examination of the whole

[1] Hale *v.* Webb, 2 Bro. Ch. R. 78; Hirst *v.* Tolson, 13 Jurist, 596.
[2] Ex parte Smyth, 1 Swanst. R. 338, and note.
[3] Ibid.
[4] Ibid.; Clun's case, 10 Co. R. 127.

subject properly belongs to another department of the law.[1] Thus, for instance, if a man had a rent charge, and purchased a part of the land, out of which it issued, the whole rent charge was extinguished.[2] But, if a part of the land came to him by operation of law, as by descent, then the rent charge was apportionable; that is, the tenant and the heir were to pay according to the value of the lands respectively held by them; and, of course, the part apportionable on the heir was extinguished.[3] But a rent service was in both cases apportionable.[4] So, if a lessor granted part of a reversion to a stranger, the rent was to be apportioned.[5] On the other hand, if part of the land out of which a rent charge issued, was evicted by a title paramount, the rent was apportioned.[6] So, although a rent charge is in its nature entire and against common right, yet if

[1] Co. Litt. 148 *a*; Com. Dig. *Suspension*, R. 6, D. 4; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; Bac. Abridg. *Rent*, M.; Com. Dig. Chancery, 4 N. 5, 2 E.; Ex parte Smyth, 1 Swanst. R. 338, 339, the Reporter's note.

[2] Co. Litt. 147 *b*., 148 *a*., 148 *b*.; Bac. Abr. *Rent*, M.; Com. Dig. *Suspension*, C. See also Averall *v.* Wade, 1 Lloyd and Goold, R. 252, and the Reporter's note, p. 264, 265. But see 1 Swanston, R. 338, note (*a*). — Mr. Swanston, in his Note (*a*) to Ex parte Smyth, 1 Swanst. R. 338, says: "Apportionment frequently denotes, not division, but distribution; and in its ordinary technical sense, the distribution of one subject, in proportion to another previously distributed." There is some reason to question the accuracy of this statement. Apportionment does not refer to a distribution of one subject, in proportion to another "previously distributed," but a distribution of a claim or charge among persons having different interests or shares, in proportion to their interest or shares in the subject-matter to which it attaches.

[3] Co. Litt. 149 *b*; Bac. Abridg. *Rent*, M.; Com. Dig. *Suspension*, C.

[4] Ibid.; Com. Dig. *Suspension*, E.

[5] Co. Litt. 148 *a*; Com. Dig. *Suspension*, E.; Ewer *v.* Moyle, Cro. Eliz. 771; Bac. Abr. *Rent*, M. 1.

[6] Com. Dig. *Suspension*, E.; Co. Litt. 147 *b*; Bac. Abr. *Rent*, M. 1, 2.

it descended to coparceners by this rule of law, the rent was apportioned between them, and the tenant was subject to several distresses for the rent, and partition might be made before seisin of the rent.[1] So a rent service incident to the reversion might be apportionable by a grant of a part of the reversion.[2]

§ 475 *b*. "In some cases a rent charge may be apportioned by the act of the party; as, if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent. So, if the grantee gives part of it to a stranger, and the tenant attorns, such grant shall not extinguish the residue, which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does; for the whole rent is still issuable out of the whole land, according to the original intention of the grant. Besides, since the law allowed of such sorts of grants, and thereby established such sort of property, it would have been unreasonable and severe to hinder the proprietor to make a proper distribution of it for the promotion of his children, or to provide for the contingencies of his family, which were in his view. The objection that has been made to these sort of apportionments or divisions of rent charges is this, that the tenant thereby would be exposed to several suits and distresses for a thing, which in its original creation was entire and recoverable upon one avowry."[3]

§ 475 *c*. And the question may also arise, "Whether

[1] Co. Litt. 164 *b*.
[2] Bac. Abridg. *Rent*, M. 1.
[3] Bac. Abridg. *Rent*, M. 1.

the tenant shall pay the whole rent, though part of the thing demised be lost and of no profit to him, or though the use of the whole be for some time intercepted or taken away without his default. And here it seems extremely reasonable, that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or apportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and, therefore, if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant without his default wants the enjoyment of part of the thing, which was the consideration of his paying the rent; nor has the lessor reason to complain, because, if the land had been in his own hands, he must have lost the benefit of so much as the sea had covered."[1]

§ 476. However reasonable an apportionment may seem to be in the case last suggested upon the ground that the tenant had not, by reason of inevitable casualty, enjoyed the full benefit of the lands demised to him, the same principle was not at the Common Law, carried out in favor of the lessor, in case the lease by inevitable casualty determined before the entire rent was due. For, in such a case, the rule was inflexibly applied, that the rent should not be apportioned. If, therefore, the lease be determined by the death of the lessor, (he having but a life-estate in the land demised,) before the day appointed for the payment of the rent, the

[1] Bac. Abridg. *Rent*, M. 2. The passage is here given as it stands in Bacon's Abridgment. But whether the doctrine therein stated would now be supported, may perhaps admit of a doubt. See Ante, § 101 to 104.

event on which that payment was stipulated, namely, the occupation of the land demised, during the period specified, no rent whatsoever was payable by the tenant, even although he had occupied the land up to a single day of the time, when the rent would have become due, for no apportionment in respect to time was, in any case, admitted by the Common Law. The executor of the deceased was not entitled to any rent, because the contract was not completely performed; the remainder-man, or reversioner, was not entitled, because the rent was not due in his time.[1] And this severe doctrine of the Common Law, artificial and unjust as it seems to be, was, as we shall presently see, scrupulously followed in Equity. It was to cure this manifest defect, that the Statute of 11 Geo. 2, (ch. 19, § 15,) was passed, and the like remedial justice has been still more amply provided for by the Statute of 4 and 5 Will. 4, ch. 22.

[1] Clun's Case, 10 Co. R. 127. The principal reason there given is, "Because the rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee: for these words *reddendo inde*, or *reservando inde*, is as much as to say, that the lessee shall pay so much of the issues and profits at such days to the lessor, for *reddere inde nihil aliud est quam acceptum restituere, seu reddere est quasi retro dare*, and *redditus dicitur, a reddendo, quia retro it, sc.* to the lessor, donor, &c., *sicut provent, a provenciendo;* and *obventus ab obvenciendo*. And that is the reason that the rent so reserved is not due or payable before the day of payment incurred, because it is to be rendered and restored out of the issues and profits; and that is the reason, that if the land is evicted, or if the lease determines before the legal time of payment, no rent shall be paid, for there shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land; and, therefore, if tenant for life makes a lease for years, rendering rent at the feast of Easter, and the lessee occupies for three quarters of the year, and in the last quarter before the feast of Easter, the tenant for life dies, here shall be no apportionment of the rent for three quarters of the year, because no rent was due till the feast of Easter, and no apportionment shall

§ 477. On the other hand, cases may easily be stated where apportionment of a common charge, or more properly speaking, where contribution towards a common charge seems indispensable for the purposes of justice, and accordingly has been declared by the Common Law in the nature of an apportionment towards the discharge of a common burden. Thus, if a man, owning several acres of land, is bound in a judgment or statute, or recognizance, operating as a lien on the land, and afterwards he alienes one acre to A, another to B, and another to C, &c.; there, if one alienee is compelled, in order to save his land to pay the judgment, statute, or recognizance, he will be entitled to contribution from the other alienees.[1] The same principle will apply in the like case, where the land descends to parceners who make partition; and, then, one is compelled to pay the whole charge; contribution will lie against the other parceners.[2] The same doctrine will apply to co-feoffees of the land, or of different parts of the land.[3] In all these cases,

be in respect of time; but in the same case, if part of the land had been evicted before the feast of Easter, and the feast of Easter occurred in the life of the lessor, there shall be an apportionment of the rent, but not in respect of the time which well continued, but in respect that parcel of the land leased is evicted." 1 Fonbl. Eq. B. 1, ch. 5, § 90, note (*o*); Ex parte Smyth, 1 Swanst. R. 338, and the Reporter's note; Bissett on Estates for Life, ch. 11, p. 268 to 272.

[1] Harbert's case, 3 Co. R. 12, 13; Viner's Abridg. *Contribution* and *Average*, A. pl. 4, 6, 8, 9, 12, 25, 27. See also American Law Mag. for April, 1844, art. 5, p. 64 to 82. But see Post, § 1233 *a*, where the subject is discussed in another connection, and the authorities are shown to be not in harmony on the subject.

[2] Ibid.; Viner's Abridg. Contribution and Average, A. pl. 6, 7, 9, 22, 23, 24.

[3] Ibid.; Harbert's case, 3 Co. R. 12; Deering *v.* Earl of Winchelsea, 1 Cox, R. 331; S. C. 2 Bos. & Pull. 276; Ante, § 499, and note.

(and others might be mentioned,) a writ of contribution would lie at the Common Law, or in virtue of the Statute of Marlebridge.[1]

[1] See Harbert's case, 3 Co. R. 12; Deering *v.* Earl of Winchelsea, 1 Cox, R. 321; S. C. 2 Bos. & Pull. 270; Co. Litt. 165 *a*; Fitzherbert Nat. Brev. 16. Lord Chief Baron Eyre, in one of his most luminous judgments, has expounded the general grounds of the doctrine of contribution, as known at the Common Law, as well as in Equity, in a manner so clear that it will be better to quote his own language than to risk impairing its force by any abridgment. "If we take a view," (said he,) "of the cases, both in Law and Equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it, as in Swain *v.* Wall, 1 Ch. Rep. 149. In the Register, p. 176 (*b*), there are two writs of contribution, one *inter co-hæredes*, the other *inter co-feoffatos*. These are founded on the Statute of Marlebridge. The great object of the statute is, to protect the inheritance from more suits than are necessary. Though contribution is a part of the provision of the statute, yet, in Fitz. N. B. 338, there is a writ of contribution at Common Law amongst tenants in common, as for a mill, falling to decay. In the same page Fitzherbert takes notice of contribution between co-heirs and co-feoffees; and, as between co-feoffees, he supposes there shall be no contribution without an agreement. And the words of the writ countenance such an idea; for the words are '*ex eorum assensu:*' and yet this seems to contravene the express provision of the statute. As to co-heirs the statute is express; it does not say so as to co-feoffees; but it gives contribution in the same manner. In Sir William Harbert's case, 3 Co. 11 (*b*), many cases of contribution are put; and the reason given in the books is, that *in æquali jure* the law requires equality. One shall not bear the burden in ease of the rest; and the law is grounded in great equity. Contract is never mentioned. Now, the doctrine of equality operates more effectually in this Court than in a Court of Law. The difficulty in Coke's cases was, how to make them contribute. They were put to their *auditâ querelâ* or *scire facias*. In Equity there is a string of cases in 1 Eq. Cas. Abr. tit. 'Contribution and Average.' Another case occurs in Hargrave's Law Tracts on the right of the King on the prisage of wine. The King is entitled to one tun before the mast, and one tun behind; and in that case a right of contribution accrues; for the King may take by his prerogative any two tuns of wine he thinks fit, by which one man might suffer solely. But the contribution is given, of course, on general principles, which govern all these cases." Deering *v.* Earl of Winchelsea, 1 Cox, R. 321; S. C. 2 Bos. & Pull. 270, 271, 272; Lord Redesdale in Stirling *v.* Forrester, 3 Bligh, R. 596, O. S.

§ 478. But there are many difficulties in proceeding in cases where an apportionment or contribution is allowed at the Common Law; for, where the parties are numerous, as each is liable to contribute only for his own portion, separate actions and verdicts may become necessary against each. And thus a multiplicity of suits may take place; and no judgment in one suit will be conclusive in regard to the amount of contribution, in a suit against another person. The like difficulty may arise in cases where an apportionment is to be made under a contract for the payment of money or rent, where the parties are numerous and the circumstances complicated. Whereas, in Equity, all parties can at once be brought before the Court in a single suit; and the decree, apportioning the rent, will thus be conclusive upon all the parties in interest.[1]

§ 479. But the ground of Equity Jurisdiction, in cases of apportionment of rent and other charges and claims, does not arise solely from the defective nature of the remedy at Common Law, where such a remedy exists. It extends to a great variety of cases where no remedy at all exists in law, and yet where, *ex æquo et bono*, the party is entitled to relief.[2] Thus, for instance, where a plaintiff was lessee of divers lands, upon which an entire rent was reserved, and afterwards the inhabitants of the town, where part of the lands lay, claimed a right of common in part of the lands so let, and, upon a trial, succeeded in establishing their right; in this case there could be no apportionment of the rent at law, because, although a right

[1] Post, § 483 to 488.
[2] Ante, § 472, 473.

of common was recovered, there was no eviction of the land. But it was not doubted that in Equity a bill was maintainable for an apportionment, if a suitable case for relief were made out.[1] So where, by an ancient composition, a rent is payable in lieu of tithes, and the lands come into the seisin and possession of divers grantees, the composition will be apportioned among them in Equity, though there may be no redress at law.[2] So, where money is to be laid out in land, if the party who is entitled to the land in fee, when purchased, dies before it is purchased, the money being in the mean time secured on a mortgage, and the interest made payable half yearly, the interest will be apportioned in Equity between the heir and the administrator of the party so entitled, if he dies before the half yearly payment is due.[3] So, where portions are payable to daughters at eighteen or marriage, and, until the portions are due, maintenance is to be allowed, payable half yearly at specific times, if one of the daughters should come of age in an intermediate period, the maintenance will be apportioned in Equity.[4]

§ 480. But still there are many cases in which Courts of Equity have refused to allow an apportionment of rent and other charges, acting, (it must be admitted,) not upon the principles which ordinarily govern them, but upon the notion of a strict obedience to the analo-

[1] Com. Dig. Chancery, 2 E., 4 N. 5; Jew *v.* Thirkenell, 1 Ch. Cas. 31; S. C. 3 Ch. Rep. 11.

[2] Com. Dig. Chancery, 4 N. 5, cites Saville, R. 5. See Aynsley *v.* Woodsworth, 2 V. & Beam. 331.

[3] Edwards *v.* Countess of Warwick, 2 P. W. 176.

[4] Hay *v.* Palmer, 2 P. Will. 501. See also Ante, § 472, 473.

gies of the law. Thus, where a purchaser of an interest in New South Sea Annuities from a husband during his life, remainder to other persons, (which had been originally secured upon a mortgage, but by order of the Court had been transferred to government securities,) insisted, in a petition in Equity, that notwithstanding the husband died before the Christmas half year became due, yet he was entitled to be paid proportionally for the time the husband lived; Lord Hardwicke said, that if it had continued a mortgage, the purchaser would have been entitled to the demand he now made, because, there, interest accrues every day for the forbearance of the principal, though, notwithstanding, it is usual in mortgages to make it payable half yearly. But, that South Sea Annuities are considered as mere annuities; and, therefore, the purchaser is no more entitled than he would be in case of a common annuity payable half yearly, where the annuitant, in whose place he stands, dies before the half year is completed.[1] This is certainly correct reasoning upon the course of the authorities; and yet it is difficult to see, why, in reason, interest payable half yearly should stand distinguished from an annuity payable half yearly. Why, in such case, may not portions of the annuity be deemed in Equity to accrue daily, as much as interest, when the latter is, like the former, payable only half yearly? The same principle has been adopted in cases where money is to be laid out in land upon a settlement, and, in the mean time, to be invested in government securities; if the tenant for life

[1] Pearly *v.* Smith, 3 Atk. 261; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (*o*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 520, 521, 522.

dies in the middle of the half year, the reversioner is entitled to the whole dividend, and there is no apportionment; although there would be, if the money were laid out on mortgage.[1]

[1] Sherrard *v.* Sherrard, 3 Atk. 502; Rashleigh *v.* Master, 3 Bro. Ch. R. 99, 101; Webb *v.* Shaftesbury, 11 Ves. 361; Wilson *v.* Harman, Ambl. R. 279; S. C. 2 Ves. 672; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (*o*); Hay *v.* Palmer, 2 P. Will. 502, and Mr. Cox's note. See also Ante, § 479. Mr. Swanston, in his learned note to the case of Ex parte Smyth, 1 Swanst. R. 338, 348, says: "The rule of law, which refuses apportionment of rent in respect of time, is applicable to all periodical payments becoming due at fixed intervals; not to sums accruing *de die in diem*. Annuities, therefore, (3 Atk. 264; 2 Bl. 1016,) and dividends on money in the funds are not apportionable. (Rashleigh *v.* Master, 3 Bro. C. C. 101; Wilson *v.* Harmon, 2 Ves. 672; Amb. 279; Pearly *v.* Smith, 3 Atk. 260; Sherrard *v.* Sherrard, 3 Atk. 502.) But interest, whether the principal is secured by mortgage, (Wilson *v.* Harman; Sherrard *v.* Sherrard,) or by bond, notwithstanding that it is expressly made payable half-yearly, (Banner *v.* Lowe, 13 Ves. 135,) may be apportioned; for, though reserved at fixed periods, it becomes due *de die in diem* for forbearance of the principal, which the creditor is entitled to recall at pleasure. Thus a sum of money, which it was covenanted in marriage-articles should be invested in lands, having been lent on mortgage, at the death of the person entitled to an estate tail in the land, the interest was apportioned in favor of his administratrix. (Edwards *v.* Countess of Warwick, 2 P. Will. 176; 1 Bro. P. C. ed. Toml. 207.) In strictness these are not cases of apportionment; (2 P. W. ed. Cox, 503, n. 1); they are not instances of the distribution of one entire subject among individuals entitled each to a part, but the appropriation of distinct subjects to the respective owners. A remarkable exception to the general rule has been introduced in the instance of annuities for the maintenance of infants, (Hay *v.* Palmer, 2 P. W. 501; Rhenish *v.* Martin, 1746, MS.; Sheppard *v.* Wilson, 4 Hare R. 395,) or of married women living separate from their husbands, (Howel *v.* Hanforth, 2 Bl. 1016; 2 Schoales & Lefr. 303); an exception supported by the necessity of the case, and the consequent presumption of intention, (2 Bl. 1017; 2 P. W. 303,) and therefore not extending to an annuity for the separate use of a married woman, living with her husband and maintained by him. (Anderson *v.* Dwyer, 1 Schoales & Lefr. 301.) An annuity, payable quarterly, secured by the bond of a testator whose will charged his real, in aid of his personal, estate, being, under an order of the Court of Chancery, directed to be paid half-yearly, at Midsummer and Christmas, and the annuitant having died between

§ 481. So, where a tenant for life made a lease of the estate for years, rendering rent quarter yearly, and died before the end of the quarter, an apportionment of the rent was denied in Equity.[1] Upon this occasion the Lord Chancellor said: "There are several remedial statutes relating to rents;[2] but this is a *casus*

Lady-day and Midsummer, her representative was declared entitled to the arrears due at Lady-day. (Webb *v.* Lady Shaftesbury, 11 Ves. 361.)

[1] Jenner *v.* Morgan, 1 P. Will. R. 392; Ante, § 476.

[2] Before the statute of 11 Geo. 2, ch. 19, § 15, if a tenant for life died before the rent day, the intermediate rent was lost. That statute has cured many hardships of the Common Law on this subject, but not all. Paget *v.* Gee, Ambler, R. 198; S. C. Id. App. p. 807, (Mr. Blunt's edition); Wykham *v.* Wykham, 3 Taunt. R. 331. The recent statute of 4 & 5 Will. ch. 22, has extended the like remedial justice to other analogous cases. Ante, § 476. It declares that all rent reserved and made payable in leases, which determine on the death of the person making them, or on the death of the life or lives, for which such person was entitled to the lands demised, shall be within the provisions of the statute of 11 Geo. 2, ch. 19. It also declares, that all rent service reserved in any lease by a tenant in fee, or for any life-interest, or by any lease granted under any power, and all rent charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every other description, made payable or coming due at a fixed period, shall be apportioned so, and in such manner that on the death of any person interested therein, &c. &c., or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, and assigns, shall be entitled to a proportion of such rents and other payments. In the construction of this statute it has been held that it applies to cases in which the interest of the person interested in such rents and payments is terminated by his death, or by the death of another person; but that it does not apply to the case of a tenant in fee, nor provide for apportionment of rent between the real and personal representatives of such person whose interest is not terminated by his death. Brown *v.* Amyott, 3 Hare, R. 173; Beer *v.* Beer, 9 Eng. Law & Eq. R. 468. See also Ex parte Smyth, 1 Swanston, R. 337, 338, and Mr. Swanston's learned note, ibid., where the principal cases are commented on at large. 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 519, 520, 521, 522.

omissus. The Law does not apportion rent in point of time, and I do not know that Equity ever did it.[1] This is an accident which the judgment creditor (the plaintiff) might have guarded against by receiving the rent weekly; so that it is his fault, and becomes a gift in law to the tenant."[2] And yet, if the tenant had actually paid the whole rent to the remainder-man, including this period, from a conscientious sense of duty, the party might, under such circumstances, have been entitled to his share *pro ratâ*. At least, in the case where a tenant in tail made a lease, but not according to the statute, and died without issue between the days of payment, and afterwards the remainder-man received the whole rents, Lord Hardwicke decreed that the executors of the tenant were entitled against him to an apportionment, although, in strictness, the tenant could not have been compelled to pay it.[3]

§ 482. The distinction between this case and the former case is extremely thin; and the reasons given for it are rather ingenious and subtile, than satisfactory. If it would not be unconscientious for the tenant to withhold the rent, because the executor of the tenant for life had no Equity, it is difficult to perceive that there can spring up any Equity against the re-

[1] In Meeley *v.* Webber, cited 2 Eq. Abridg. 704, where a person leased his tithes at a rent payable at Michaelmas, and died in September, the Court decreed an apportionment. There is much good sense in the decision. See also Aynsley *v.* Woodsworth, 2 V. & Beam. R. 331.

[2] Jenner *v.* Morgan, 1 P. Will. 392. See Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 519, 520, 521.

[3] Paget *v.* Gee, Ambl. R. 198; S. C. App. (Mr. Blunt's edition,) p. 807; Ex parte Smyth, 1 Swanst. R. 337, and note; Id. 355, 356; Aynsley *v.* Woodsworth, 2 V. & Beam. 331; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 520.

mainder-man, unless the tenant paid the rent with an express understanding that there should be an apportionment, which can hardly be pretended to have been proved in the cases on this point.[1] It would have been, perhaps, more consonant to the general principles of Courts of Equity, to have decided that, as the tenant held his lease upon the terms of a compensatory contract, it was against conscience that he should be at liberty to treat the rent, under any circumstances of an involuntary departure from the terms of the lease, as a gift;[2] and that, as the parties had omitted to provide in their contract for the exigency, Equity would presume an intention of the parties to treat the rent as accruing, *pro tanto*, from day to day; and as a *debitum in præsenti solvendum in futuro*. Lord Hardwicke, on one occasion, in discussing a question of apportionment, after quoting the maxim, *Æquitas sequitur legem*, added: "When the Court finds the rule of law right, it will follow them; but then it will likewise go beyond them."[3]

[1] See Hawkins *v.* Kelly, 8 Ves. 308 to 312; Ex parte Smyth, 1 Swanst. R. 346, 347, 348, note.

[2] See Vernon *v.* Vernon, 2 Bro. Ch. R. 659, 662.— Lord Thurlow seems to have proceeded upon a principle somewhat like this in Vernon *v.* Vernon, (2 Bro. Ch. R. 659, 662,) holding, that where a person was a tenant from year to year, or a tenant at will under a tenant in tail, the demises being determinable at his death, and he dying before the half year expired, the rent should be apportioned between the representatives of the tenant in tail and the remainder-man. His Lordship said: "That the tenant holding from year to year, or period to period, from a guardian, without lease or covenant, cannot be allowed to raise an implication in his own favor, that he should hold without paying rent to anybody." See Hawkins *v.* Kelly, 8 Ves. 312; Ex parte Smyth, 1 Swanston, R. 337, and ibid., Mr. Swanston's learned note; Clarkson *v.* Earl of Scarborough, cited 1 Swanston, R. 354, note (*a*).

[3] Paget *v.* Gee, Ambler, R. App. p. 810, (Mr. Blunt's edition.)

§ 483. But a far more important and beneficial exercise of Equity Jurisdiction in cases of apportionment and contribution, is where incumbrances, fines, and other charges on real estate are required to be paid off, or are actually paid off by some of the parties in interest.[1] This subject has already come incidentally under our notice,[2] but it requires a more ample examination in this place. In most cases of this sort there is no remedy at law, from the extreme uncertainty of ascertaining the relative proportions, which different persons, having interests of a very different nature, quality, and duration, in the subject-matter, ought to pay. And, where there is a remedy, it is inconvenient and imperfect, because it involves multiplicity of suits, and opens the whole matter for contestation anew, in every successive litigation.[3]

§ 484. The subject may be illustrated by one of the most common cases, that of an apportionment and contribution towards a mortgage upon an estate, where the interest is required to be kept down, or the incumbrance to be paid. Let us suppose a case where different parcels of land are included in the same mortgage, and these different parcels are afterwards sold to different purchasers, each holding in fee and severalty, the parcel sold to himself. In such a case, each purchaser is bound to contribute to the discharge of the common burden or charge, in proportion to the value which his

[1] Com. Dig. Chancery, 2 J., 2 S.; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and notes; Ritson *v.* Brumlow, 1 Ch. Rep. 91; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 409; Scribner *v.* Hitchcock, 4 Johns. Ch. R. 530; Averall *v.* Wade, Lloyd & Gould, R. 252, and the Reporter's note, 264, 265, 266.

[2] Ante, § 477.

[3] Ante, § 477, 478.

parcel bears to the whole included in the mortgage.[1] But, to ascertain the relative values of each, is a matter of great nicety and difficulty; and unless all the different purchasers are joined in a single suit, as they can be in Equity, although not at Law, the most serious embarrassments may arise in ascertaining the proportion of each purchaser, and in making it conclusive upon all others.

§ 485. So, if there are different persons, having different interests in an estate under mortgage, as, for instance, parceners,[2] tenants for life or in tail, remainder-men, tenants in dower or for a term of years, or for other limited interests, it is obvious that the question of apportionment and contribution in redeeming the mortgage, as well as in payment of interest, may involve the most important and intricate inquiries; and to do entire justice, it may be indispensable that all the parties in interest should actually be brought before the Court. Now, in a suit at the Common Law, this is absolutely impossible; for no persons can be made parties, except those whose interest is joint, and of the same nature and character, and is immediate and vested in possession. So that a resort to a Court of Equity, where all these interests can be brought before the Court, and definitely ascertained and disposed of, is indispensable. If to this we add, that in most cases of mortgage, an account of what has been paid upon the mortgage, either by direct payments or by perception of the rents and profits of the estate, is necessary

1 Cheeseborough v. Millard, 1 Johns. Ch. R. 409, 415; Stevens v. Cooper, 1 Johns. Ch. R. 425; Harris v. Ingledew, 3 P. Will. 98, 99; Herbert's case, 3 Co. R. 14; Taylor v. Porter, 7 Mass R. 355.

2 Stirling v. Forrester, 3 Bligh, R. 590, 596.

be taken, we shall at once see that the machinery of a Court of Common Law is very ill adapted to any such purpose. But, if we add farther to all this, that there may be mesne incumbrances and other cross equities between some of the parties, all of which are required to be adjusted, in order to arrive at a just result, and to attain the full end of the law by closing up all future litigation, we shall not fail to be convinced, that the only appropriate, adequate, and effectual remedy must be administered in Equity. Indeed, from its very nature, as we shall have occasion to see fully hereafter, the jurisdiction over mortgages belongs peculiarly and exclusively to Courts of Equity. And wherever, as is the case in some of the American States, an attempt has been made to engraft the remedy of redemption upon the ordinary processes of Courts of Law, it has been found to be inconvenient, embarrassing, and, in complicated cases, impracticable.

§ 486. Very delicate, and often very intricate questions arise, in the adjustment of the rights and duties of the different parties in interest in the inheritance. In the first place, in regard to the paying off of incumbrances. If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished; and the remainder-man cannot be called upon for contribution, unless the tenant in tail has kept alive the incumbrance, or preserved the benefit of it to himself by some suitable assignment, or has done some other act or thing, which imports a positive intention to hold himself out as a creditor of the estate, in lieu of the mortgagee. The reason for this doctrine is, that a tenant in tail can, if he pleases, by fine or recovery, become the absolute owner of the estate; and, therefore, his discharge of incumbrances is treated, as made

in the character of owner, unless he clearly shows that he intends to discharge them and become a creditor thereby.[1] But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated by the birth of issue of another person; for it must be inferred that such a tenant in tail, in paying off an incumbrance without an assignment, means to keep the charge alive.[2] *A fortiori*, the doctrine would not apply to the case of a tenant for life paying off an incumbrance; for, if he should pay it off without taking an assignment, he would be deemed to be a creditor to the amount paid, upon the ground that there can be no presumption that, with his limited interest, he could intend to exonerate the estate.[3] He cannot be presumed, *primâ facie*, to discharge the estate from the debt; for that would be to discharge the estate of another person from the debt. But, in both cases, the presumption may be rebutted by circumstances, which demonstrate a contrary intention.[4]

§ 487. In respect to the discharge of incumbrances, it was formerly a rule in Equity, that the tenant for life and the reversioner, or remainder-man, were bound to contribute towards the payment of incumbrances,

[1] Wigsell *v.* Wigsell, 2 Sim. & Stu. R. 364; Jones *v.* Morgan, 1 Bro. Ch. R. 206; Kirkham *v.* Smith, 1 Ves. 258; Amesbury *v.* Brown, 1 Ves. 477; Shrewsbury *v.* Shrewsbury, 3 Bro. Ch. R. 120; S. C. 1 Ves. jr. 227; St. Paul *v.* Viscount Dudley and Ward, 15 Ves. 173; Faulkner *v.* Daniel, 3 Hare, R. 199, 217.

[2] Wigsell *v.* Wigsell, 2 Sim. & Stu. R. 364.

[3] Saville *v.* Saville, 2 Atk. 463, 464; Jones *v.* Morgan, 1 Bro. Ch. R. 218; Shrewsbury *v.* Shrewsbury, 1 Ves. jr. 233; S. C. 3 Bro. Ch. R. 120; Ex parte Digby, Jacob, R. 235.

[4] Jones *v.* Morgan, 1 Bro. Ch. R. 218, 219; St. Paul *v.* Viscount Dudley and Ward, 15 Ves. 173; Redington *v.* Redington, 1 B. & Beatt. R. 141, 142.

in a positive proportion, fixed by the Court; so that they paid a gross sum, in proportion to their interests in the estate. The usual proportion was, for the tenant for life to pay one third, and the remainder-man or reversioner to pay two thirds of the charge.[1] A similar rule was applied to cases of fines paid upon the renewal of leases.[2] But the rule is now, in both cases, entirely exploded in England; and a far more reasonable rule is adopted. It is this: that the tenant shall contribute beyond the interest, in proportion to the benefit he derives from the liquidation of the debt, and the consequent cessation of annual payments of interest during his life (which of course will depend much upon his age and the computation of the value of his life); and it will be referred to a Master, to ascertain and report what proportion of the capital sum due, the tenant for life ought, upon this basis, to pay, and what ought to be borne by the remainder-man or reversioner.[3] If the estate is sold to discharge incumbrances, (as the incumbrancer may insist that it shall be,) in such a case the surplus, beyond what is necessary to discharge the incumbrances, is to be applied as follows: the income thereof is to go to the tenant for life, during his life; and then the whole capital is to be paid over to the remainder-man or reversioner.[4]

[1] Powell on Mortg. ch. 11, p. 311; Ballet *v.* Sprainger, Prec. Ch. 62; Shrewsbury (County of) *v.* Earl of Shrewsbury, 1 Ves. jr. 233; Rives *v.* Rives, Prec. Ch. 21; 1 Fonbl. Eq. B. 1, ch. 5, § 9, note (*a*), 3d ed.; Faulkner *v.* Daniel, 3 Hare, R. 199, 217.

[2] White *v.* White, 4 Ves. 33; Verney *v.* Verney, 1 Ves. 428; S. C. Amb. R. 88; Nightingale *v.* Lawson, 1 Bro. Ch. R. 440.

[3] See 1 Powell on Mortg. ch. 11, p. 311, 312, Mr. Coventry's note, M; Penrhyn *v.* Hughes, 5 Ves. 107; White *v.* White, 4 Ves. 33, 9 Ves. 554; Allan *v.* Backhouse, 2 Ves. & B. 70, 79.

[4] Penrhyn *v* Hughes, 5 Ves. 107; White *v.* White, 4 Ves. 33; 3

§ 488. In regard to the interest due upon mortgages and other incumbrances, the question often arises, by whom and in what manner it is to be paid. And here, the general rule is, that a tenant for life of an equity of redemption is bound to keep down and pay the interest, although he is under no obligation to pay off the the principal.[1] But a tenant in tail is not bound to keep down the interest; and yet, if he does, his personal representative has no right to be allowed the sums so paid, as a charge on the estate.[2] The reason of this distinction is, that a tenant in tail, discharging the interest is supposed to do it, as owner, for the benefit of the estate. He is not compellable to pay the interest; because he has the power, at any time, to make himself absolute owner against the remainder-man, and reversioner. The latter have no Equity to compel him, in their favor, to keep down the interest, inasmuch, as if they take any thing, it is solely by his

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Powell on Mortg. ch. 19, p. 922, Mr. Coventry's note, H; Id. 1043, note O; Lloyd *v.* Johnes, 9 Ves. 37; Foster *v.* Hilliard, 1 Story, R. 77. Many cases may occur of far more complicated adjustments, than are here stated; but in a treatise like the present, little more than the general rules can be indicated. See Rives *v.* Rives, Prec. Ch. 21; 1 Fonbl. Eq. B. 1, ch. 5, § 9, and note. See also Gibson *v.* Crehore, 5 Pick. R. 146. The converse case of that stated in the text will readily occur to the learned reader, namely, where mortgage money or a mortgage is devised to a tenant for life, with a remainder over, and the mortgage money is paid by the mortgagor. The old rule used to be, to divide it between the tenant for life and the remainder-man, in the proportion of one third and two thirds. But it would probably now be governed by the same rules as those in the text. 3 Powell on Mortg. 1043, Mr. Coventry's note, O.

[1] Saville *v.* Saville, 2 Atk. 463, 464; Shrewsbury *v.* Shrewsbury, 1 Ves. jr. 233.

[2] Amesbury *v.* Brown, 1 Ves. 480, 481; Redington *v.* Redington, 1 Ball & B. 143; Chaplin *v.* Chaplin, 3 P. Will. 234, 235.

forbearance, and, of course, they must take it *cum onere*.[1]

§ 488 *a*. Similar questions may arise, as to the apportionment of the money between a tenant for life and a remainder-man in fee, who have united in a sale of the estate, without providing for the manner of apportioning the purchase-money between them, and one of them has died before any apportionment has been made. In such a case how is the money to be divided? Is the tenant for life to be deemed entitled to the income of the whole fund during his life, and then the whole fund go to the remainder-man? Or is the value of the estate of each party to be ascertained, calculating that of the tenant for life according to the common tables respecting the probabilities of life, and the principal of the fund to be apportioned between them accordingly? It has been held, upon deliberate consideration, that the latter is the true rule, applicable to such cases, upon the ground, that it must be presumed, in such cases of a joint sale, that the parties mean to share the purchase-money according to their respective interests in the estate at the time of the sale, and not merely to substitute one fund for another.[2]

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[1] Ibid. — There is an exception to the general rule, that a tenant in tail is not bound to keep down the interest, which confirms, rather than impugns, the general rule. If the tenant in tail is an infant, his guardian or trustee will, in that case, be required to keep down the interest. The reason is, that the infant, of his own free will, cannot bar the remainder, and make himself absolute owner. See Jeremy on Eq. Jurisd. B. 1, ch. 2, § 1, p. 187; Sergeson *v.* Sealey, 2 Atk. 416, and Mr. Saunders's note (1), ibid.; Amesbury *v.* Brown, 1 Ves. 479, 480, 481; Bertie *v.* Lord Abingdon, 3 Meriv. R. 560.

[2] Foster *v.* Hilliard, 1 Story, R. 77, where the subject was discussed at large. See, also, Brent *v.* Brent, 1 Vern. R. 69; Truelock *v.* Robey, 11

§ 489. These remarks may suffice to show (for it is not our purpose to bring the minute descriptions upon these important subjects under a full review)[1] the beneficial operation of Courts of Equity, in apportionments and contributions, upon this confessedly intricate subject; and, also, how utterly inadequate a Court of Common Law would be to do complete justice, in a vast variety of cases which may easily be suggested. Without some proceedings in the nature of an account before a Master, there would be no suitable elements upon which any Court of Justice could dispose of the merits of such cases, so as to suppress future litigation, or to administer to the conflicting rights of different parties.

§ 490. Another class of cases, which still more fully illustrates the importance and value of this branch of Equity Jurisdiction, is that of GENERAL AVERAGE, a subject of daily occurrence in maritime and commercial operations. General Average, in the sense of the maritime law, means a general contribution, that is to be made by all parties in interest, towards a loss or expense, which is voluntarily sustained or incurred for the benefit of all.[2] The principle upon which this contribution is founded, is not the result of contract, but has its origin in the plain dictates of natural law.[3] It has been more immediately derived to us from the positive declarations of the Roman Law, which borrowed it from the more ancient text of the

Jurist, 999; Thynn *v.* Duvall, 2 Vern. R. 117; Houghton *v.* Hapgood, 13 Pick. R. 154. But see Penrhyn *v.* Hughes, 5 Ves. 99, 107.

[1] See 1 Bridgman's Digest, *Average* and *Contribution*, I., II.; 1 Chitty, Eq. Dig. *Apportionment.*

[2] Abbot on Shipp. Pt. 3, ch. 8, § 1, p. 342; Moore's Rep. 297; Viner's Abridg. *Contribution* and *Average*, A. pl. 1, 2, 26.

[3] Id.; Deering *v.* Earl of Winchelsea, 1 Cox, R. 318, 323; S. C. 2 Bos. & Pull. 270, 274; Stirling *v.* Forrester, 3 Bligh, R. 590, 596.

Rhodian Jurisprudence. Thus, the Rhodian Law, in cases of jettison, declared, that "If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all. *Lege Rhodia* (says the Digest) *cavetur, ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*"[1] But the principle is by no means confined to cases of jettison; but it is applied to all other sacrifices of property, sums paid, and expenses voluntarily incurred in the course of maritime voyages, for the common benefit of all persons concerned in the adventure. The principle has, indeed, been confined to a sacrifice of property, and the contribution confined to the property saved thereby, although it certainly might have gone farther, and have required a corresponding apportionment of the loss or sacrifice of property upon all persons, whose lives have been preserved thereby, upon the same common sense of danger, and purchase of safety, alluded to by Juvenal, when, in a similar case, his friend desired his life to be saved by a sacrifice of his property; — *Fundite, quæ mea sunt etiam pulcherrima.*

§ 491. General Average being, then, as has been already stated, not confined to cases of jettison, but extending to other losses and expenditures for the common benefit, it may readily be perceived, how difficult it would be for a Court of Law to apportion and adjust the amount, which is to be paid by each distinct interest, which is involved in the common calamity and expenditure. Take, for instance, the common case of a general ship or packet, trading between Liverpool

[1] Dig. Lib. 14, tit. 2, l. 1.

and New York, and having on board various shipments of goods, not unfrequently exceeding a hundred in number, consigned to different persons, as owners or consignees; and suppose a case of general average to arise during the voyage, and the loss or expenditure to be apportioned among all these various shippers, according to their respective interests, and the amount which the whole cargo is to contribute to the reimbursement thereof. By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board, are to contribute to such reimbursement, according to their relative values. The first step, in the process of general average, is to ascertain the amount of the loss for which contribution is to be made, as, for instance, in the case of jettison, the value of the property thrown overboard, or sacrificed for the common preservation. The value is generally indefinite and unascertained, and, from its very nature, rarely admits of an exact and fixed computation. The same remark applies to the case of ascertainment of the value of the contributory interests, the ship, the freight, and the cargo. These are generally differently estimated by different persons, and rarely admit of a positive and indisputable estimation in price or value. Now, as the owners of the ship, and the freight, and the cargo, may be, and generally are, in the supposed case, different persons, having a separate interest, and often an adverse interest to each other, it is obvious, that unless all the persons in interest can be made parties in one common suit, so as to have the whole adjustment made at once, and made binding upon all of them, infinite embarrassments must arise, in ascertaining and apportioning the general average. In a proceeding at the Common Law, every party, having a

sole and distinct interest, must be separately sued;[1] and as the verdict and judgment in one case will not only not be conclusive, but not even be admissible evidence in another suit, as it is *res inter alios acta;* and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which, of course, might be differently estimated by different juries, it is manifest that the grossest injustice, or the most oppressive litigation might take place in all cases of general average on board of general ships. A Court of Equity, having authority to bring all the parties before it, and to refer the whole matter to a Master, to take an account, and to adjust the whole apportionment at once, affords a safe, convenient, and expeditious remedy. And it is accordingly the customary mode of remedy in all cases, where a controversy arises, and a Court of Equity exists in the place, capable of administering the remedy.[2]

§ 492. Another class of cases, to illustrate the beneficial effects of Equity Jurisdiction over matters of Account, is that of CONTRIBUTION BETWEEN SURETIES, who are bound for the same principal, and upon his default, one of them is compelled to pay the money, or to perform any other obligation, for which they all became bound.[3] In cases of this sort, the surety who has paid the whole, is entitled to receive contribution from all the others, for what he has done in relieving them from a common burden.[4]

[1] Abbott on Shipp. Pt. 3, ch. 8, § 17.

[2] Abbott on Shipp. Pt. 3, ch. 8, § 17; Shepherd *v.* Wright, Show. Parl. Cas. 18; Hallett *v.* Bousefield, 18 Ves. 190, 196.

[3] Com. Dig. Chancery, 4 D. 6.

[4] Layer *v.* Nelson, 1 Vern. 456. On the subject of contribution, there is a valuable note of the reporter's to the case of Averall *v.* Wade, Lloyd

§ 493. The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound, and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all, upon the maxim, *Qui sentit commodum, sentire debet et onus.*[1] And the doctrine has an equal foundation in morals; since no one ought to profit by another man's loss, where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim; and, upon motives of mere caprice or favoritism, to make a common burden a most gross personal oppression. It would be against Equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. And the creditor is always bound in conscience, although he is seldom bound by contract, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound.[2] It can be no matter of surprise, therefore, to find, that Courts of Equity, at a very early period, adopted and acted upon this salutary doctrine, as equally well founded in Equity and morality.[3] The ground of relief does not, there-

& Goold, Rep. 264 to 266; Spencer *v.* Parry, 3 Adolph. & Ell. 331; Davies *v.* Humphries, 6 Maule & Selw. 153; Cowell *v.* Edwards, 2 Bos. & Pull. 268; Brown *v.* Lee, 6 Barn. & Cress. 689; Kemp *v.* Finden, 12 Mees. & Welsb. 421.

[1] See Shelly's case, 1 Co. Rep. 99; Dering *v.* Earl of Winchelsea, 1 Cox, R. 318, 322; S. C. 2 Bos. & Pull. 270, 274; Craythorne *v.* Swinburne, 14 Ves. 159; Rogers *v.* Mackenzie, 4 Ves. 752.

[2] Stirling *v.* Forrester, 3 Bligh, Rep. 590, 591.

[3] Com. Dig. Chancery, 4 D. 6, S. 2; Peter *v.* Rich, 1 Ch. R. 34; Morgan *v.* Seymour, 1 Ch. R. 121; Stirling *v.* Forrester, 3 Bligh, R. 590, 591.

fore, stand upon any notion of mutual contract, express or implied, between the sureties, to indemnify each other in proportion, (as has sometimes been argued); but it arises from principles of Equity, independent of contract.[1] If the doctrine were otherwise, a surety would be utterly without relief; because (as we shall presently see) he has not, either in Equity, or at law, any title to compel the obligee to assign over the bond to him, upon his making payment or otherwise discharging the obligation.[2]

[1] Dering *v.* Earl of Winchelsea, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270; 1 White & Tudor's Eq. Lead. Cases, 60, and notes; Ex parte Gifford, 6 Ves. 805; Craythorne *v.* Swinburne, 14 Ves. 159; Stirling *v.* Forrester, 3 Bligh. R. 490, 596; Campbell *v.* Mesier, 4 Johns. Ch. R. 334, 338; Onge *v.* Truelock, 2 Molloy, R. 31, 42; Copis *v.* Middleton, 1 Turn. & Russ. 224; Hodgson *v.* Shaw, 3 Mylne & Keen, 191. In Stirling *v.* Forrester, 3 Bligh, R. 496, Lord Redesdale said: "The decision in Dering *v.* Lord Winchelsea, (1 Cox, 318; 2 Bos. & Pull. 270,) proceeded on a principle of law, which must exist in all countries, that, where several persons are debtors, all shall be equal. The doctrine is illustrated in that case by the practice in questions of average, &c., where there is no express contract, but Equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally. So it is where goods are thrown overboard for the safety of the ship. The owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation." Post, § 495, note (2). But see Johnson *v.* Johnson, 11 Mass. R. 359; Taylor *v.* Savage, 12 Mass. R. 98.

[2] Gammon *v.* Stone, 1 Ves. 339; Woffington *v.* Sparks, 2 Ves. 569, 570. But see Morgan *v.* Seymour, 1 Ch. R. 120, and Ex parte Crisp, 1 Atk. 135; Copis *v.* Middleton, 1 Turn. & Russ. R. 224; Hodgson *v.* Shaw, 3 Mylne & Keen, 189; Dowbiggin *v.* Bourne, 2 Younge & Coll. 471; Reed *v.* Norris, 2 Mylne & Craig, 361. — Mr. Chancellor Kent, in Cheeseborough *v.* Millard, (1 Johns. Ch. R. 413,) seems to have thought that a surety paying off a debt is entitled to a cession or assignment of the debt, to enable him to have satisfaction from the principal and his co-sureties. He relied on the cases in 1 Ch. R. 20, and 1 Atk. 35; but he did not cite the cases in 1 Ves. 339, and 2 Ves. 569, 570. However, the point was not decided by him. See also Avery *v.* Petten, 7 Johns.

§ 494. In the Roman Law analogous principles existed, although from the different arrangements of that system, they were developed under very different modifications. By that law, sureties were liable, indeed, for the whole debt due to the creditor; but this liability was subject to three modifications. In the first place the creditor was generally bound to proceed by process of discussion (as it is now called,) in the first instance against the principal debtor, to obtain satisfaction out of his effects, before he could resort to the sureties. In the next place, in a suit against one surety, although each surety was bound for the whole debt after the discussion of the principal debtor; yet the surety in such suit had a right to have the debt apportioned among all the solvent sureties on the same

Ch. R. 211, where the same learned Chancellor acted upon the ground that an assignment might be decreed; but upon very satisfactory grounds he refused it in that case. His grounds, however, seem equally applicable against any assignment in any case, where all the parties in interest are not before the Court; and if they are, there seems no necessity for the assignment, since there may be a direct decree for contribution without it. It is one thing to decide that a surety is entitled, on payment, to have an assignment of the debt; and quite another to decide that he is entitled to be subrogated, or substituted, as to other equities and securities, in the place of the creditor, against the debtor and his co-sureties. See King *v.* Baldwin, 2 Johns. Ch. R. 560; Hayes *v.* Ward, 4 Johns. Ch. R. 123. See also Himes *v.* Keller, 3 Watts & Serg. 401; Bowditch *v.* Green, 3 Metc. R. 310; Powell's Ex'ors *v.* White, 11 Leigh, R. 309. In Stirling *v.* Forrester, 3 Bligh, R. 590, 591, Lord Redesdale said: "If several persons are indebted, and one makes payment, the creditor is bound in conscience, if not by contract, to give the party paying the debt, all his remedies against the other debtors." Mr. Theobald, in his Treatise on Principal and Surety, ch. 10, § 270, has by mistake attributed a remark of Sir Samuel Romilly, arguendo, to the Lord Chancellor. It bears on this very point, and therefore the error should be corrected. See Post, § 499 to 502, and notes, ibid.; and Wright *v.* Morley, 11 Ves. 12, 22; Butcher *v.* Churchill, 14 Ves. 568, 575, 576; Post, § 635, 636.

obligation, so that he should be compellable to pay his own share only; and this was called the benefit of division.[1] But if a surety should pay the whole debt, without insisting upon the benefit of division, then he had no right of recourse over against his co-sureties, unless (which is the third case) upon the payment, he procured himself to be substituted to the original debt (which he might insist on) by a cession thereof from the creditor; in which case he might insist upon a payment of a proper proportion from each of his co-sureties.[2] And, in case of the insolvency of either of the sureties, the share of the insolvent was to be apportioned upon all the solvent sureties, *pro ratâ*.[3] The same principles in a great measure, but not in all cases, now regulate the same subject among the continental nations of Europe, whose jurisprudence is derived from the Civil Law.[4]

[1] Domat, B. 3, tit. 4, § 2, art. 1, 6; Pothier on Oblig. by Evans, n. 407; Pothier, Pand. Lib. 46, tit. 1, § 5, art. 1, n. 41 to 45; Id. art. 3, n. 51 to 61; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 414; Hayes *v.* Ward, 4 Johns. Ch. R. 131, 132; Post, § 636, note.

[2] 1 Domat, B. 3, tit. 4, § 4, art. 1; Pothier on Oblig. by Evans, n. 407, 519, 520, 521 (556, 557, 558, of the French editions); Pothier, Pand. Lib. 50, tit. 1, art. 2, n. 45 to 51.

[3] 1 Domat, B. 3, tit. 4, art. 2; Pothier on Oblig. by Evans, n. 407, 415, 418, 419, 420, 421, 445, 518, 519, 520, 521, (555 to 559, of French editions); Id. 282; Pothier, Pand. Lib. 46, tit. 1, art. 2, n. 45 to 51; Dig. Lib. 46, tit. 1, l. 26; Cod. Lib. 8, tit. 14, l. 2. See also 1 Bell, Comm. B. 3, Pt. 1, ch. 3, § 3, art. 283 to 286; Ersk. Inst. B. 3, tit. 3, art. 61 to 74; 1 Domat, B. 3, tit. 1, § 3, art. 6, and Domat's note; Post, § 635.

[4] Merlin, Repert. art. *Discussion;* Id. *Division;* Pothier on Oblig. by Evans, Pt. 2, ch. 6, art. 2, n. 407, 415, 416; Id. Pt. 2, ch. 3, art. 8, n. 280; Id. Pt. 3, ch. 1, art. 6, § 2, n. 519 to 524 (556 to 559, of the French editions); 1 Domat, B. 3, tit. 1, § 3, art. 6, and Domat's note, ibid.; Cod. Lib. 8, tit. 14, l. 2. The same principle, in regard to the necessity of the creditor's discussing the principal debtor, before resort-

§ 495. Originally, it seems to have been questioned, whether contribution between sureties, unless founded upon some positive contract between them, incurring

ing to the surety, has been adopted in most countries deriving their jurisprudence from the Civil Law; but it is not universally adopted. It prevails in France, Holland, and Scotland; but not (as it seems) generally in Germany. See Mr. Chancellor Kent's learned opinion in Hayes *v.* Ward, 4 Johns. Ch. R. 130 to 135, where he cites the foreign authorities on this point. These authorities fully justify his statement. The following extract from that opinion may be acceptable. "According to the Roman Law, in use before the time of Justinian, the creditor, as with us, could apply to the surety, before applying to the principal. *Jure nostro est potestas creditori, relicto reo, eligendi fidejussores* (*Code*, Lib. 8, tit. 41, § 5); and the same law was declared in another imperial ordinance (*Code*, Lib. 8, tit. 41, § 19.) But Justinian, in one of his Novels, (*Nov.* 4, c. 1, entitled *Ut Creditores primo loco conveniant Principalem*,) allowed to sureties the exception of discussion, or *beneficium ordinis*, by which they could require that, before they were sued, the principal debtor should, at their expense, be prosecuted to judgment and execution. It is a dilatory exception, and puts off the action of the creditor against the surety, until the remedy against the principal debtor has been sufficiently exhausted. This provision in the Novels has not been followed in the states and cities of Germany, except in Pomerania (Heinecc. Elem. Jur. Germ. lib. 2, tit. 16, § 449, 450, 451, 465); but it has been adopted in those other countries in Europe, as France, Holland, Scotland, &c., which follow the rules of the Civil Law (Pothier, Trait. des Oblig. No. 407–414; Code Napoléon, No. 2021, 2, 3; Voet, Com. ad Pand. tit. De Fidejussoribus, 46, 1, 14–20; Hub. Prælec. lib. 3, tit. 21, § 6; Ersk. Inst. 504, § 61). A rule of such general adoption shows that there is nothing in it inconsistent with the relative rights and duties of principal and surety, and that it accords with a common sense of justice, and the natural equity of mankind." It may be well here to state that I generally cite Pothier on Obligations from Mr. Evans's edition. It is important to remark that after n. 456, in Evans's edition, the subsequent numbers differ from the common French editions, owing to Pothier having, in his later editions, inserted, between that number and number 457, a new section containing thirty-five numbers, so that No. 457, in Evans's edition, stands in the common editions of Pothier, No. 493. See Mr. Evans's note (*a*) to Pothier on Oblig. Pt. 2, ch. 6, § 9, p. 306. This explanation may be useful to the reader, to prevent mistakes or suppose mistakes in the references usually made in English and American works to Pothier. Post, § 635 to 640.

such liability, was a matter capable of being enforced at law. But there is now no doubt that it may be enforced at law, as well as in Equity, although no such contract exists.[1] And it matters not in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt.[2]

§ 496. But still the jurisdiction now assumed in Courts of Law upon this subject, in no manner affects that originally and intrinsically belonging to Equity.[3]

[1] See Kemp *v.* Finden, 12 Mees. & Welsb. 421; Norton *v.* Coons, 3 Denio 130; Harris *v.* Ferguson, 2 Bailey, 397.

[2] Dering *v.* Earl of Winchelsea, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270; 1 Saun. R. 261 (*a*), Mr. Williams's note (*c*); Craythorne *v.* Swinburne, 14 Ves. 159, 169. In Stirling *v.* Forrester (3 Bligh, R. 590, O. S.) Lord Redesdale said: "The principle established in the case of Dering *v.* Lord Winchelsea, is universal, that the right and duty of contribution is founded in doctrines of Equity. It does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in Equity rest upon the same principle. It would be against Equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in Dering *v.* Lord Winchelsea; and in that case there was no evidence of contract, as in this. So, in the case of land descending to coparceners, subject to a debt; if the creditor proceeds against one of the coparceners, the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others; at the most, they are only bound to pay their proportions." His Lordship afterwards, in pronouncing judgment, added the words which have been already cited in § 493, note. See also Post, § 498, in what cases no contribution is allowed.

[3] Wright *v.* Hunter, 5 Ves. 792.

Indeed, there are many cases in which the relief is more complete and effectual in Equity than it can be at law; as, for instance, where an account and discovery are wanted; or where there are numerous parties in interest, which would occasion a multiplicity of suits.[1] In some cases the remedy at law is now utterly inadequate. As, if there are several sureties, and one is insolvent, and another pays the debt; he can at law recover from the other solvent sureties only the same share as he could if all were solvent. Thus, if there are four sureties, and one is insolvent, a solvent surety, who pays the whole debt, can recover only one fourth part thereof (and not a third part) against the other two solvent sureties.[2] But in a Court of Equity, he will be entitled to recover one third part of the debt against each of them; for, in Equity the insolvent's share is apportioned among all the other solvent sureties.[3]

§ 497. And upon the like grounds, if one of the sureties dies, the remedy at law lies only against the surviving parties; whereas, in Equity, it may be enforced against the representative of the deceased party, and he may be compelled to contribute his share to the surviving surety, who shall pay the whole debt.[4]

[1] Craythorne *v.* Swinburne, 14 Ves. 159; Cornell *v.* Edwards, 2 Bos. & Pull. 268; Wright *v.* Hunter, 5 Ves. 792.

[2] Cornell *v.* Edwards, 2 Bos. & Pull. 268; Brown *v.* Lee, 6 B. & Cressw. 697. See also Rogers *v.* Mackensie, 4 Ves. 752; Wright *v.* Hunter, 5 Ves. 792.

[3] Peter *v.* Rich, 1 Ch. Rep. 34; Cornell *v.* Edwards, 2 Bos. & Pull. 268; Hale *v.* Harrison, 1 Ch. Cas. 246; Dering *v.* Earl of Winchelsea, 2 Bos. & Pull. 270; S. C. 1 Cox, R. 318. But see Swain *v.* Wall, 1 Ch. Rep. 149, 150, 151. See also Pothier on Oblig. n. 275, 281, 282, 428, 521 (n. 556, of the French editions), the same principles.

[4] Primrose *v.* Bromley, 1 Atk. 89

Where there are several distinct bonds with different penalties, and a surety upon one bond pays the whole, the contribution between the sureties is in proportion to the penalties of their respective bonds. But, as between the sureties to the same bond, the general rule is that of equality of burden *inter sese*.[1]

§ 498. These are cases of contribution of a simple and distinct character. But, in cases of suretyship, others of a very complicated nature may arise from counter equities between some or all of the parties, resulting from contract or from equities between themselves, or from peculiar transactions regarding third persons.[2] Thus, for instance, although the general rule is, that there shall be a contribution between sureties by the rule of equality, that may be modified by express contract between them; and in such a case Courts of Equity will be governed by the terms of such contract, in giving or refusing contribution.[3] In like manner, there may arise by implication from the very nature of the transaction, an exemption of one surety from becoming liable to contribution in favor of another. Thus, if one surety should not upon his own mere motion, but at the express solicitation of his cosurety, become a party to the instrument; and such co-surety should afterwards be compelled to pay the whole debt; in such a case, he would not be entitled

[1] See Dering *v.* Earl of Winchelsea, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270

[2] See Hyde *v.* Tracey, 2 Day, Cas. 422; Ransom *v.* Keyes, 9 Cowen, R. 128.

[3] Swain *v.* Wall, 1 Ch. R. 149; Craythorne *v.* Swinburne, 14 Ves. 159, 169; Dering *v.* Earl of Winchelsea, 1 Cox, R. 318; S. C. 2 Bos. & Pull. 270.

to contribution, unless it clearly appeared that there was no intention to vary the general right of contribution, in the understanding of the parties.[1] So, if different sureties should be bound by different instruments for equal portions of the debt of the same principal, and it clearly appeared that the suretyship of each was a separate and distinct transaction, there would be no right of contribution of one against the other.[2] So, if there should be separate bonds, given with different sureties, and one bond is intended to be subsidiary to, and a security for the other, in case of a default in payment of the latter, and not to be a primary concurrent security; in such a case the sureties in the second bond would not be compellable to aid those in the first bond by any contribution.[3]

§ 498 *a*. A question of another sort has arisen; How far, and under what circumstances, the discharge of one surety by the creditor would operate as a discharge of the other sureties from their liability. It seems now clearly established at law, that a release or discharge of one surety by the creditor will operate as a discharge of all the other sureties, even though it may be founded on a mere mistake of law.[4] But it may be doubtful, whether the same rule will be allowed universally to prevail in Equity. Thus, if a creditor has accepted a

[1] Turner *v.* Davies, 2 Esp. R. 478; Mayhew *v.* Crickett, 2 Swanst. R. 193; Taylor *v.* Savage, 12 Mass. R. 98, 102.

[2] Coope *v.* Twynam, 1 Turn. & Russ. 426. It would be different, if it should appear, that it was the same transaction split into different parts by the agreement of all the parties. Ibid.

[3] Craythorne *v.* Swinburne, 14 Ves. 159. See Cooke *v.* ———, 2 Freem. R. 97.

[4] Nicholson *v.* Revell, 4 Adolph. & Ellis, 675; S. C. 6 Nev. & Mann. R. 200; Ante, § 112.

composition from one surety, and discharged him, it has been thought that he might still recover against another surety his full proportion of the original debt, without deducting the composition paid, if it did not exceed the proportion for which the surety was originally liable. In other words each surety, notwithstanding such discharge, might be held liable in Equity to pay his share of the original debt, treating each as liable for his equal or *pro ratâ* proportion, upon an equitable apportionment of it.[1]

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[1] In Ex parte Gifford, (6 Ves. 805,) Lord Eldon held that a discharge of one surety did not discharge the other sureties; and that, as each surety was bound to contribute his share towards the general payment, no one could recover over against another who had been discharged, unless for the excess paid by him beyond his due proportion. The creditor might, therefore, accept a composition from one surety, and still proceed against another to recover his full proportion of the original debt, without deducting the composition paid, if it did not exceed the proportion for which the surety was originally liable. Mr. Theobald, in his Treatise on Principal and Surety, (ch. 11, § 283, note (*i*), p. 267,) thinks this decision could not have been made; and that it is mis-reported. I see no reason to question either the accuracy of the Report, or the soundness of the doctrine. If the discharge of one surety is not the discharge of another, it seems difficult to see how the sum paid by one surety shall take away the obligation of another to pay his proportion of the original debt, if, upon the discharge, the right to proceed against such surety for his proportion was expressly, or by implication, reserved to the extent of that proportion. This seems to have been the ground of Lord Eldon's decision. In Stirling *v.* Forrester, (3 Bligh, R. 591,) Lord Redesdale said: "If the creditor discharges one of the coparceners, he cannot proceed for his whole debt against the others; at the most, they are only bound for their proportions." The same principle would apply to co-sureties; and, indeed, Stirling *v.* Forrester, (3 Bligh, R. 591, 596,) seems mainly to have been decided upon this ground. The distinction is between a discharge of the principal, and a discharge of the surety; between a part payment by a surety, and a part payment by the principal. In the recent case of Nicholson *v.* Revell, (4 Adolph. & Ellis, 675; S. C. 6 Nev & Mann. 192, 200,) the Court of King's Bench decided, that the creditor's discharge of one debtor on a joint and several note was in law a discharge of all the debtors. Lord Denman, in delivering the judgment of the Court,

§ 498 *b*. Indeed, circumstances may exist, under which even a release of the principal might not release the surety from the debt, where it was clear, from the whole transaction, that it was intended that the surety should remain bound. Thus, where, before the release

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said: "This view cannot, perhaps, be made entirely consistent with all that is said by Lord Eldon, in the case Ex parte Gifford, where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle, to which we have adverted, was not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down, that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favor of the defendant." It is, however, to be remembered, that his Lordship was here dealing with the question at law; but it by no means follows, that, because a security is extinguished at law, therefore it it extinguished in Equity, if it is the clear intention of the parties, that it shall not be extinguished. See 2 Story on Eq. Jurisp. § 1370, 1372. Pothier adopts very much the same principles and reasoning as Lord Eldon; asserting that the release of the creditor of one debtor would liberate all the others if the creditor meant thereby to extinguish the debt; but not, if the creditor meant to reserve his rights against the other co-debtors for their proportions. 1 Pothier on Oblig. by Evans, n. 275, 278, 279, 280, 281; Id. n. 521 [556]. Pothier has also treated the point of a discharge of one surety; and he holds, that a discharge of one surety discharges the other sureties, for such proportion of the debt, as, upon payment of the whole debt, they could have had recourse to him for. Pothier on Oblig. by Evans, n. 275, 277, 280, 281, 428, 429, 445, 519, 520, 521, 521 B., 323 [n. 556 – 560, of the French editions]. The rule of the Civil Law is the same. Si ex duobus, qui apud te fidejusserrant in *viginti*, alter, ne ab eo peteres, *quinque* tibi deberit, vel promiserit; nec alter liberabitur. Et si ab altero *quindecim* petere institueris, nulla exceptione (cedendarum actionum) summoveris. Reliqua autem *quinque*, si a priori fidejussore petere institueris, doli mali exceptione summoveris. Dig. Lib. 46, tit. 1, l. 15, § 1; Pothier, Pand. Lib. 46, tit. 1, n. 47.

to the principal, the surety had paid part of the debt, and given a security (an acceptance) for the remainder, it was held that it was not a release of the surety, in the absence of all evidence to establish the contrary intent.[1]

§ 499. Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal; but they are also entitled to the benefit of all securities which have been taken by any one of them, to indemnify himself against such liabilities.[2] Courts of Equity have gone farther in their favor, and held them entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities, both of a legal and an equitable nature, which the creditor has taken as an additional pledge for his debt.[3] Thus, for example, if, at the time when the bond of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt; there, if the surety pays the debt, he will

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[1] Hall *v.* Hutchins, 3 Mylne & Keen, 426.

[2] See Theobald on Principal and Surety, ch. 11, § 283; Swain *v.* Wall, 1 Ch. Rep. 149. But see Bowditch *v.* Green, 3 Metc. R. 360; Himes *v.* Keller, 3 Watts & Serg. R. 401; Commercial Bank of Lake Erie *v.* Western Reserve Bank, 11 Ohio, (Stanton) R. 444; Wiggin *v.* Dorr, 3 Sumner, R. 410.

[3] Craythorne *v.* Swinburne, 14 Ves. 159; Wright *v.* Morley, 11 Ves. 12, 22; Copis *v.* Middleton, 1 Turn. & Russ. R. 224; Jones *v.* Davis, 4 Russ. R. 277; Dowbiggin *v.* Bourne, 1 Younge, R. 111; S. C. 2 Younge & Coll. 462, 470; Hodgson *v.* Shaw, 3 Mylne & Keen, 183; Reed *v.* Norris, 2 M. & Craig, R. 361; Ante, § 327; Ex parte Rushworth, 10 Ves. 409, 420, 422; Mayhew *v.* Crickett, 2 Swanst. R. 191; Wade *v.* Coope, 2 Sim. R. 155. But see Bowditch *v.* Green, 3 Metc. R. 360, contrà. But a surety for a part of a debt is not entitled to the benefit of a security given by the debtor to the creditor at a different time for another part of the debt. Wade *v.* Coope, 2 Simons, R. 155.

be entitled to have an assignment of that mortgage, and to stand in the place of the mortgagee.[1] And, as the mortgagor cannot get back his estate again without a reconveyance, that assignment and security will remain a valid and effectual security in favor of the surety, notwithstanding the bond is paid.[2] This indeed, is but an illustration of a much broader doctrine established by Courts of Equity, which is that a creditor shall not, by his own election of the fund, out of which he will receive payment, prejudice the rights which

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[1] See Loud *v.* Sergeant, 1 Edw. Ch. R. 164; Marsh *v.* Pike, 1 Sandf. 211; McLean *v.* Towle, 3 Sandf. 117, 136, 161; Bank *v.* Campbell, 2 Rich. Eq. R. 180; Atwood *v.* Vincent, 17 Conn. 576; Wheatley *v.* Calhoun, 12 Leigh, 265.

[2] Ante, § 421 *a*; Williams *v.* Owen, The (English) Jurist, 30th Dec. 1843, p. 1145, and the learned note of the Reporter, p. 1146, 1147; Copis *v.* Middleton, 1 Turn. & Russ. 224, 229, 231; Dowbiggin *v.* Bourne, 2 Younge & Coll. 471, 472. Lord Brougham, in the case of Hodgson *v.* Shaw, 3 Mylne & Keen, 190, 191, 192, puts this doctrine in a strong light. "The rule here," (says he) "is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from Equity than from contract or *quasi* contract; unless in so far as the known Equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the Court in this respect was luminously expounded in the argument of Sir Samuel Romilly in Craythorne *v.* Swinburne, (14 Ves. 159); and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval. 'A surety,' to use the language of Sir S. Romilly's reply, 'will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor.'" See, also, Boultby *v.* Stubbs, 16 Ves. R. 20; Stokes *v.* Mendon, 3 Swanst. R. 130, note; Mayhew *v.* Crickett, 2 Swanst. R. 185, 190, note; Beckett *v.* Booth, 1 Eq. Abridg. 595.

other persons are entitled to; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund, to which they cannot resort.[1] It is often exemplified in cases where a party, having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party, who can resort to that fund only. In such a case, the disappointed party is substituted in the place of the electing creditor, or the latter is compelled to resort, in the first instance, to that fund which will not interfere with the rights of the other.[2]

§ 499 *a*. The principle seems in former times to have been carried farther by Courts of Equity, and to have authorized the surety to insist upon an assignment, not merely of collateral securities, properly speaking, but of collateral incidents and dependent rights, growing out of the original debt. Thus, where the principal in a bond had been sued, and gave bail, and judgment was obtained against the principal, and also against the

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[1] Wright *v.* Morley, 11 Ves. 12; Ex parte Gifford, 6 Ves. 805, 807. See Rumbold *v.* Rumbold, 3 Ves. 63; Mayhew *v.* Crickett, 2 Swanst. R. 186, 191; Miller *v.* Ord, 2 Binn. 382; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 409, 412; Stevens *v.* Cooper, 1 Johns. Ch. R. 430; Lawrence *v.* Cornell, 4 Johns. Ch. R. 545; King *v.* Baldwin, 2 Johns. Ch. R. 554; Hayes *v.* Ward, 4 Johns. Ch. R. 123; Clason *v.* Morris, 10 Johns. R. 524; Evertson *v.* Booth, 19 Johns. R. 486; Averall *v.* Wade, Lloyd & Goold, R. 252; Ante, § 324, 326, 493; Post, § 502; Stirling *v.* Forester, 3 Bligh, R. 590, 591; Post, § 633 to 640; Selby *v.* Selby, 4 Russ. R. 336; Gwynne *v.* Edwards, 2 Russ. R. 289 *n.*; Bute *v.* Cunynghame, 2 Russ. R. 275; Post, § 558, 559, 560 to 568; Boazman *v.* Johnson, 3 Sim. R. 377.

[2] Sagittary *v.* Hyde, 1 Vern. 455, and Mr. Raithby's note; Mills *v.* Eden, 10 Mod. R. 488; Aldrich *v.* Cooper, 8 Ves. 388; Trimmer *v.* Bayne, 9 Ves. 209; Robinson *v.* Wilson, 2 Madd. R. 437; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 412, 413; King *v.* Baldwin, 2 Johns. Ch. R. 554; Hayes *v.* Ward, 4 Johns. Ch. R. 123; 1 Madd. Ch. Pr. 202, 203; Post, § 558, 559, 633, 634, 635, 636, 1028.

bail, by the creditor, and afterwards the sureties on the original bonds (who had counter bonds) were compelled to pay it; and then brought their bill in Equity to have the benefit of the judgment of the creditor against the bail, by having it assigned to them; it was decreed by the Court accordingly. So that although the bail were themselves but sureties, as between themselves and the principal debtor, yet, coming in the room of the principal debtor, as to the creditor, it was held, that they likewise came in the room of the principal debtor, as to the sureties on the original bond.[1] This decision consequently established, that the original sureties had precisely the same rights that the creditor had; and were to stand in his place. The original sureties had no direct contract or engagement by which the bail were bound to them; but only a claim against the bail, through the medium of the creditor, to all whose rights, and the power of enforcing them, they were held to be entitled.[2] This decision has been much questioned; and although it may be distinguishable in its circumstances from others on which we shall have occasion to comment, yet it must now be deemed to be much shaken in point of authority.[3] But, however this may be, it seems certain, that a surety upon a second bond, given as collateral security for the original bond, has a right, upon payment of his own bond, to be substituted to the original creditor, as to the first bond,

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1 Parsons *v.* Briddock, 2 Vern. R. 608; Wright *v.* Morley, 11 Ves. 22.

2 Wright *v.* Morley, 11 Ves. 22.

3 Hodgson *v.* Shaw, 3 Mylne & Keen, 189. But see Wright *v.* Morley, 11 Ves. 22; Dowbiggin *v.* Bourne, 1 Younge, R. 111, 114, 115: S. C. 2 Younge & Coll. 462, 472, 473.

and to have an assignment thereof, as an independent subsisting obligation for the debt.[1]

§ 499 *b*. Another point of more extensive importance in practice is, whether a surety, who pays off the debt of the principal, for which he is bound, is entitled to require the creditor, upon such payment, to make an assignment to him of the debt, and of the instrument by which it is evidenced. It seems formerly to have been thought, that he had such a right; and the general language of some of the authorities, that the surety is in such cases entitled to every remedy which the creditor had against the principal, was supposed fully to justify and support this conclusion.[2] But the doctrine is now fully established [in England[3]] that the surety has no such right to be enforced in Equity, and that he cannot insist upon any such assignment. The

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[1] Hodgson *v.* Shaw, 3 Mylne & Keen, 183, 193; Ante, § 493, note; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 413; Avery *v.* Petten, 7 Johns. Ch. R. 211. See Himes *v.* Keller, 3 Watts & Serg. 401.

[2] Ex parte Crispe, 1 Atk. 135; Parsons *v.* Briddock, 2 Vern. R. 608; Wright *v.* Morley, 11 Ves. 12, 21, 22; Dowbiggin *v.* Bourne, 1 Younge, R. 411; S. C. 2 Younge & Coll. 464; Butcher *v.* Churchill, 14 Ves. 567, 575, 576; Ex parte Rushforth, 10 Ves. 409, 414; Robinson *v.* Wilson, 2 Madd. R. 464; Craythorne *v* Swinburne, 14 Ves. 160, 162. See, also, Hodgson *v.* Shaw, 3 Mylne & Keen, 183, 185; Hodgam *v.* Stone, 1 Turner & Russ. R. 226, note; Butcher *v.* Churchill, 14, Ves. 568, 575, 576.

[3] [But it seems not in America. The doctrine of Copis *v.* Middleton has not generally been received with approbation by the American Courts, and it has here often been held, that although the lien or security be extinguished at law, yet, for the benefit of the security, it continues in Equity in full force. See Lathrop & Dale's appeal, 1 Barr, 512; Powell *v.* White, 11 Leigh, 309; Speigle Myer *v.* Crawford, 6 Paige, 254; Rodgers *v.* McClure, 4 Gratt. 81; McCleary *v.* Beirne, 10 Leigh, 395; Perkins *v.* Kershaw, 1 Hill, Ch. R. 344; 2 Bland, 509; 1 Harr. 374; Tinsley *v.* Anderson, 3 Call, 329; Burns *v.* Huntingdon Bank, 1 Penn. R. 395; Fleming *v.* Beaver, 2 Rawle, 132; Croft *v.* Moore, 9 Watts, 417; Cuyler. *v.* Ernsworth, 6 Paige, 32; Mathews *v.* Aiken, 1 Comst. 595.]

ground is, that by the payment of the debt, the title derived under the instrument has become extinguished, and *functus officio;* and, therefore, an assignment thereof would be utterly useless; and if the surety should afterwards sue for the debt at law, in the name of the creditor, the principal might plead such payment in bar of the action.[1] In such a case it would make no difference in the right of the surety to sue, that upon payment of the debt, he had procured an assignment thereof to be made to a third person, instead of to himself for his benefit.[2] Neither would it make any difference, that several judgments had been obtained by the creditor against the principal and surety, and that the latter had paid the debt on the judgment against him, and then sought an assignment to be made of the judgment against the principal; for the judgment would be effectually extinguished by such payment; and the surety would not be permitted to avail himself of it against the principal.[3]

§ 499 *c.* The error of the contrary opinion, if indeed upon the principles of enlarged Equity, any there be, seems to have arisen from confounding the right of the surety, on payment of the debt, to be substituted for the creditor, and to have an assignment of any inde-

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[1] Woffington *v.* Shaw, 2 Ves. 569; Gammon *v.* Stone, 1 Ves. 339; Copis *v.* Middleton, 1 Turn. & Russ. 224, 229; Jones *v.* Davids, 4 Russ. R. 297; Hodgson *v.* Shaw, 3 Mylne & Keen, 183; Hudson *v.* Stalwood, Cas. Temp. Hard. 133; Davis *v.* Perrine, 4 Edw. C. R. 65; Morrison *v.* Marvin, 6 Ala. R. 797; Briley *v.* Sugg, 1 Dev. & Bat. 366; Armitage *v.* Baldwin, 5 Beav. R. 278.

[2] See Reed *v.* Norris, 2 Mylne & Craig, 361; Jones *v.* Davids, 4 Russ. R. 277; Copis *v.* Middleton, 1 Turn. & Russ. 224, 229. But see Butcher *v.* Churchill, 14 Ves. 568, 575, 576.

[3] Dowbiggin *v.* Bourne, 2 Younge & Coll. 464. But see Hill *v.* Kelly, 1 Ridg. L. & Schoales, R. 265.

pendent collateral securities, with the supposed right to have the original debt assigned. Such independent collateral securities may well be required to be assigned by the creditor, in favor of the surety; because, in many cases, the principal would not be entitled to have a re-transfer thereof from the surety, without paying him the sums advanced by him to the creditor, as a matter of Equity between the parties. But the assignment of the debt itself, which had been already paid, would be a mere nullity in Equity, as well as at law, since it could not have, in the hands of the surety, any subsisting obligation.[1]

[1] This whole subject is examined in a masterly manner by Lord Eldon, in Copis *v.* Middleton, 1 Turn. & Russ. R. 224, 229, 231, and by Lord Brougham, in Hodgson *v.* Shaw, 3 Mylne & Keen, 183. In a former case, Lord Eldon said, "It is a general rule, that in Equity a surety is entitled to the benefit of all the securities which the creditor has against the principal. But then, the nature of those securities must be considered. When there is a bond merely, if an action was brought upon the bond, it would appear, upon oyer of the bond, that the debt was extinguished. The general rule, therefore, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back, upon payment, to the person of the principal debtor. In the case, for instance, where, in addition to the bond, there is a mortgage with a covenant, on the part of the principal debtor, to pay the money, the surety, paying the money would be entitled to say, I have lost the benefit of the bond; but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor." Lord Brougham, speaking on the same subject, said, "The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt, shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high; and the right results more from Equity than from contract or *quasi* contract; unless in so far as the known Equity may be supposed to be imported into any transaction, and so to raise a contract by implication. The doctrine of the Court, in this respect, was luminously expounded in the argument of Sir Samuel Romily, in Craythorne *v.* Swinburne; and Lord Eldon, in giving judgment in that case, sanctioned the exposition by his full approval.

§ 499 *d*. Upon reasoning somewhat analogous to that, the supposed error of which we have been considering, it was formerly held, that if a surety

'A surety,' to use the language of Sir Samuel Romilly's reply, 'will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor.' I have purposely taken this statement of the right, because it is there placed as high as it ever can be placed; and yet, it is quite consistent with the principle of Copis *v.* Middleton. Thus, the surety paying is entitled to every remedy, which the creditor has. But can the creditor be said to have any specialty after the bond is gone by payment? The surety may enforce any security against the debtor, which the creditor has; but by the supposition there is no security to enforce, for the payment has extinguished it. He has a right to have all the securities transferred to him; but there are, in the case supposed, none to transfer. They are absolutely gone. He may avail himself of all those securities against the debtor, but his own act of payment has left none of which he can take advantage." See, also, Dowbiggin *v.* Bourne, 2 Younge & Coll. 462, 471. It is observable, that the whole of this reasoning proceeds upon the ground, that by the payment by the surety, the original debt is extinguished. Now, that is precisely what the Roman Law (as we shall presently see) denied; and it treated the transaction between the surety and the creditor according to the presumed intention of the parties, to be, not so much a payment, as a sale of the debt. 1 Domat, B. 3, tit. 1, § 6, art. 1; Post, § 500, and §§ 635, 636, 637. It is not wonderful, that Courts of Equity, with this enlarged doctrine in their view, which is in entire conformity to the intention of the parties, as well as to the demands of justice, should have struggled to adopt it into the Equity Jurisprudence of England. The opposing doctrine is founded more on technical rules, than on any solid reasoning founded in general Equity. In truth, Courts of Equity, in many cases, do adopt it, and act upon it, as in cases where they give the right of substitution to particular parties, where there are two funds, out of one of which a creditor has insisted upon receiving satisfaction, to the disappointment of the parties who have no claim upon the other fund. Ante, § 499; Post, 633 to 640. Whether it might not have been as wise for Courts of Equity to have followed out the Roman Law, to its full extent, instead of adopting a modified rule, which stops, or may stop, short of some of the purposes of

upon a bond debt should discharge it, he would be entitled to be considered as substituted for the original creditors, as a specialty creditor of his principal; and, consequently, in the marshalling of the assets of the principal, he would, as to the debt so paid, have a priority over simple contract creditors.[1] But upon this point, also, a different doctrine [in England] is now established; and it is held that a surety, so paying a bond debt, will be treated, in marshalling assets, as a mere simple contract creditor.[2] The ground

reciprocal justice, it is now too late to inquire, and, therefore, the discussion would be useless. See Cheeseborough *v.* Millard, 1 Johns. Ch. R. 409, 412, 413, 414; Ante, § 493, note. Sir William Grant, in Butcher *v.* Churchill (14 Ves. 568, 575, 576,) seems to have proceeded upon the principle of the Roman Law, in holding that the assignment of a bond to a surety, who had compounded the debt with the creditor, and taken the assignment, ought to be upheld in Equity, however it might be at law, for the purpose of securing to him the amount he had paid on the bond and interest. But see Armitage *v.* Baldwin, 5 Beav. R. 278, where the surety paid the debt due to the creditor after the creditor had obtained judgment for it against the principal debtor, and also another judgment against his bail in that action, and upon such payment the surety took an assignment from the creditor of both judgments — Lord Langdale thought, that as the bill alleged, that the surety had "duly paid and satisfied the original judgment," he could not maintain a bill against the bail on the judgment against him, to charge the estate of the bail. But his Lordship suggested, that the plaintiff might, by a proper proceeding, ultimately succeed in establishing a right against the estate of the bail.

[1] Hotham *v.* Stone, 1 Turn. & Russ. R. 226, note; Robinson *v.* Wilson, 2 Madd. R. 464; Wright *v.* Morley, 11 Ves. 22; Powell's Ex'ors. *v.* White, 11 Leigh, R. 309, fully approves this same doctrine.

[2] Copis *v.* Middleton, 1 Turn. & Russ. 224, 229, 231; Jones *v.* Davids, 4 Russ. R. 277; Foster *v.* Athneim, 1 Ala. R. 302; Hodgson *v.* Shaw, 3 Mylne & Keen, 183. [*Contra*, in most American States. See Eppes *v.* Randolph, 2 Call, 125; 3 Id. 329; West *v.* Belcher, 5 Munf. 187; McMahon *v.* Fawcett, 2 Rand. 514; Watts *v.* Kinney, 3 Leigh, 272; Wheatley *v.* Calhoun, 12 Leigh, 265; Litterdale *v.* Robinson, 2 Brock. 161; 12 Wheat, 504; Pride *v.* Boyce, 1 Rice, Eq. R. 276; Schultz *v.* Carter, 1 Speer's Eq. R. 534; Croft *v.* Moore, 9 Watts, 451; Lathrop &

of this doctrine is, that the surety is not subrogated to the rights of the creditor in such a case (whether he has procured an assignment of the bond, when paid or not); but he is in fact as well as in law, to be deemed only as having paid money for the principal upon the footing of an implied contract of indemnity subsisting between them.[1] Yet there are many cases in which a

Dale's Appeal, 1 Barr. 512; Enders *v.* Brune, 4 Rand. 438; Grider *v.* Payne, 9 Dana, 188; Dias *v.* Bouchand, 3 Edw. Ch. R. 485; United States *v.* Hunter, 5 Mason, 62]

[1] Ibid. Lord Eldon, in Copis *v.* Middleton, 1 Turn. & Russ. 228, said: "I take the present case to be simply this. Upon loans of money to A, joint bonds were given by A and B, B being surety for A; two of the bonds were paid off by B in the lifetime of A; now, if one of two joint obligors, being a surety, pays off the debt in the lifetime of the principal, he is at law merely a simple contract creditor of the principal; and, if the principal lives for twenty years after the payment of the debt, he continues during all that time to be at law a simple contract creditor only. Then the question is, Whether, by the death of the principal, he is to be converted, in a Court of Equity, into a specialty creditor against his assets. With respect to the bond paid off after the death of the principal, the questions are: Whether, inasmuch as, at the death of principal, there was money due upon the bond, there was an Equity on the part of the surety to compel the creditor to go in against the assets of the principal; and, Whether, there having been no interposition for that purpose, the right of the surety to stand in the place of the creditor can now be maintained. When it is considered that this was a joint bond, and that no action at law could be maintained except against the surety, the surviving debtor, it is a strong proposition to say, that the surviving debtor is to be considered in Equity as a specialty creditor against the assets of the deceased debtor." And again in p. 230, 231, 232, he said: "The facts of this case are simply these. Two individuals gave a bond, the one as the principal and the other as surety; no other assurance was executed at the time; no mortgage was made to secure the debt; no counterbond was given by the principal to the surety; and the question to be decided is, Whether the surety, having paid the bond after it was due, is a simple contract or a specialty creditor. I understand it to have been the opinion of the Master, an opinion founded on one or two cases, which have been stated, that the surety was to be considered as a specialty creditor, to stand in the place of the person whom he paid. That doctrine appears to me to be contrary to all that has been settled during the whole

surety paying a debt, will be entitled to stand in the place of the creditor, or to obtain the full benefit of all

time I have been in this Court. Everything that was arranged in bankruptcy before the late statute, enabling the surety to prove every thing determined before, appeals to me to have authorized the Court to consider it quite clear, that if there was nothing in the case beyond what I have stated, the surety, having paid the bond, could be nothing more than a simple contract creditor in respect of that payment. The bond was not assigned to anybody in consideration of a sum of money paid, which was one way we used to manage these things; there was no counterbond given which was another way in which we used to manage these things; so that if the surety paid one bond, he became instantly a specialy creditor by virtue of the other bond. If any suit was now instituted I apprehend the payment of the bond would show that the bond was gone. There has been a case cited, where upon the general ground that a surety is entitled to the benefit of all securities, which the creditor has against the principal, it seems to have been thought that the surety was entitled to be, as it were, a bond creditor, by virtue of the bond. I take it to be exceedingly clear, if, at the time the bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee; and, as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid. But, if there is nothing but the bond, my notion is, that, as the law says, that bond is discharged by the payment of what was due upon it, the bond is gone, and cannot be set up." Lord Brougham, in Hodgson *v.* Shaw, 3 Mylne & Keen, 190, 191, 192, still more elaborately expounded the doctrine. "When," (said he) "a person pays off a bond, in which he is either co-obligor or bound *subsidiarie*, he has, at law, an action against the principal for money paid to his use; and he can have nothing more. The joint obligation towards the creditor is held to give to the principal notice of the payment, and also to prove his consent or authority to the making that payment. This is necessary for enabling any man, who pays another's debt, to come against that other; because a person cannot make himself the creditor of another by volunteering to discharge his obligations. But beyond this claim, which is on simple contract merely, there exists none against the principal by the surety, who pays his debt; nor, when the matter is closely viewed, ought there to exist any other. The obligation, by specialty, is incurred, not towards the surety, even in the event of his paying, but only towards the obligee. And there is no natural reason, why, because I bind myself under seal to pay another person's debt, the creditor requiring a security of that high nature, I

the proceedings of the creditor against the principal. Thus, for example, if the creditor, in case of the bankruptcy of the principal, has proved his debt before the commissioners, and then the surety pays the debt, the latter will be entitled to the dividends declared on his estate, and the creditor will be held to be his trustee for this purpose.[1] So, the surety may

should, therefore, have as high a security against the principal debtor. If I had chosen to demand it, I might have taken a similar obligation, when I became so bound. And, if I omitted to do so, I can only be considered as possessing the rights which arise from having paid money for him, which I had voluntarily, and without consideration, undertaken to pay. The case standing thus at law, do considerations of Equity make any alteration in its aspect?" His Lordship then proceeded to state, what is contained in the passage already cited Ante, § 499 *c*, note 1, p. 561, and then added: "Living the principal debtor, the surety could only bring *indebitatus assumpsit* for the money he had paid to that principal's use. The death of that debtor cannot clothe him with a higher title. Living the debtor, the creditor could not have assigned the bond on payment by the surety; for there was no longer any thing to assign. The death of the debtor cannot surely operate a revivor of the specialty, enable the creditor to assign it, or the Court to hold it assigned in Equity, and empower the surety to sue upon it the executors or administrators of him, who, had he chanced to survive, never could have been sued, except upon the money counts in an action of *assumpsit*. Observe the consequence that would have followed from any other principles, while the law of debtor and creditor continued, as it was till the recent alteration, and when landed estates were not real assets for payment of simple contract debts. If the principal debtor continued alive, the surety could not in any way touch his real estates, except through the medium of a judgment. But if he happened to die his real estates became assets, although the law had never been changed. There can be no doubt, therefore, with respect to the principle of Copis *v.* Middleton; and Lord Eldon expressed himself without any hesitation in that case, though pressed with the authority of Sir William Grant in Hotham *v.* Stone, upon which he remarked, that the case had been appealed and compromised without coming to an argument." But see in America the case of Powell's Ex'ors. *v.* White, 11 Leigh, R. 309, which upholds the old doctrine.

[1] Ex parte Rushforth, 10 Ves. 409; Wright *v.* Morley, 11 Ves. 12, 22, 23; Watkins *v.* Flanagan, 3 Russ. R. 421; Ex parte Houston, 2 G. & Jamieson, 36; Ex parte Gee, 1 G. & Jamieson, 330.

compel the creditor to go in and prove his debt before the commissioners; and then, if he pays the whole debt the creditor will in like manner become a trustee of the dividends for him.[1] [So, where a surety for the purchase-money of land, pays the debt, he is subrogated to the vendor's lien on the land for the unpaid purchase-money.[2]] In cases of this sort Courts of Equity seem to be regulated by the same principles, which govern their interference, in favor of sureties, to compel creditors to proceed in the first instance against the principal for the recovery of their debts.[3]

§ 500. Upon this subject a far more liberal and comprehensive doctrine pervades the Roman Law. Not only is the surety by that law entitled in such cases to the benefit of all the collateral securities taken by the creditor; but he is also entitled to be substituted, as to the very debt itself, to the creditor, by way of cession or assignment. And upon such cession or assignment upon payment of the debt by the surety, the debt is in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its original obligatory force against the principal.[4] *Fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere cæterorum nomina. Cum is, qui et reum et fidejussores habens, ab uno ex fide-*

[1] Ex parte Rushforth, 10 Ves. 409, 414; Wright *v.* Simpson, 6 Ves. 734.

[2] Eddy *v.* Traver, 6 Paige, 521; Welch *v.* Parran, 2 Gill, 320; Magruder *v.* Peter, 11 Gill, & John. 219; Kleiser *v.* Scott, 6 Dana, 137; Burk *v.* Chisman, 3 B. Monroe, 50. In re, McGill, 6 Barr, 504.

[3] Ante, § 327; Post, § 630.

[4] Pothier on Oblig. by Evans, n. 275, 280, 281, 428, 429, 430, 519, 520, 521, 522, [n. 556, 557, 558, 559, of the French editions.]

jussoribus accepta pecunia, præstat actiones; poterit quidem dici, nullas jam esse, cum suum perceperit, et perceptione omnes liberati sunt. Sed non ita est; non enim in solutum accepit, sed quodammodo nomen debitoris vendidit. Et ideo habet actiones, quia tenetur ad id ipsum, ut præstet actiones.[1] Here we have the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends, affirmed. The reasoning may seem a little artificial; but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the Civil Laws.[2]

§ 501. The Roman Law carried its doctrines yet farther, in furtherance of the great principles of Equity. It held the creditor bound not to deprive himself of the power to cede his rights and securities to the surety, who should pay him the debt; and, if by any voluntary and unnecessary act of his own, such a cession became impracticable, the surety might, by what was technically called *Exceptio cedendarum actionum*, bar the creditor of so much of his demand, as the surety might have received by a cession or assignment of his liens and rights of action against the principal debtor. *Si creditor a debitore culpa sua causa ceciderit, propè est, ut*

[1] Dig. Lib. 46, tit. 1, l. 17, 36; Pothier, Pand. Lib. 46, tit. 1, n. 46; Ante, § 327, 494; Post, § 635 to 638; 1 Domat, B. 3, tit. 1, § 3, art. 6, 7; Id. § 6, art. 6, 7; Pothier on Oblig. by Evans, n. 275, 280, 281, 428, 429, 430, 519, 520, 521, 522 [n. 556, 557, 558, 559, of the French editions.]

[2] Voet, ad Pand. lib. 46, tit. 1, § 27, 29, 30; Pothier on Oblig. by Evans, n. 275, 280, 281, 427, 428, 429, 430, 519, 529, 522 n. 555, 556, 557, of the French editions;] Huber, Prælect. Inst. Lib. 3, tit. 21, n. 8; 1 Bell, Comm. B. 3, Pt. 1, ch. 3, § 3, p. 264, &c., art. 283, 4th edit.; Ersk. Inst. B. 3, tit. 3, art. 68; 1 Kaimes, Eq. 122, 124.

actione mandati nihil a mandatore consequi debeat; cum ipsius vitio acciderit, ne mandatori possit actionibus cedere.[1] But this qualification should be added, that a mere omission by the creditor to collect the debt due of the hypothecated property, so that it is lost by his laches, will not discharge the sureties; but the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge, in order to discharge the surety.[2]

§ 502. The same doctrine has been in some measure transfused into the English law in an analogous form; not indeed by requiring an assignment or cession of the debt to be made; but by putting the surety, paying the debt, under some circumstances, in the place of

[1] Dig. Lib. 46, tit. 2, l. 95, § 11; Pothier, Pand. Lib. 46, tit. 1, n. 46, 47; Pothier on Oblig. by Evans, n. 275, 280, 428, 429, 430, 519, 520, 521, 521 B., 522 [n. 555, 556, 557, 558, 559, 560, of the French editions]; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 414; Stevens *v.* Cooper, 1 Johns. Ch. R. 430, 431; Hayes *v.* Ward, 4 Johns. Ch. R. 130. In this last case Mr. Chancellor Kent said: "According to the doctrine of the Civil Law, the surety may, *per exceptionem cedendarum actionum*, bar the creditor of so much of his demand, as the surety might have received by an assignment of his lien and right of action against the principal debtor; *provided* the creditor had, by his own unnecessary or improper act, deprived the surety of that resource. The surety by his very character and relation of surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage, so taken by the creditor, is taken and held in trust, as well for the secondary interest of the surety, as for the more direct and immediate benefit of the creditor; and the latter must do no wilful act, either to poison it in the first instance, or to destroy or cancel it afterwards. These are general principles founded in Equity, and are contained in the doctrines laid down in Pothier's Treatise on Obligations, No. 496, 519, 520, to which reference has been made in the former decisions of this Court." See also Post, § 635, 636. The case of Macdonald *v.* Bell, 3 Moore, Privy Council, Rep. 315, 332, fully recognizes the same doctrine.

[2] Macdonald *v.* Bell, 3 Moore, Priv. Council, Rep. 315, 332. See Schroeppell *v.* Shaw, 3 Comst. 457.

the creditor.[1] And, if the creditor should knowingly have done any act to deprive the surety of this benefit, the surety, as against him, would be entitled to the same Equity as if the act had not been done.[2] On the other hand if a surety has a counter bond or security from the principal, the creditor will be entitled to the benefit of it; and may in Equity reach such security to satisfy his debt.[3]

§ 503. There are many other cases of contribution, in which the jurisdiction of Courts of Equity is required to be exercised, in order to accomplish the purposes of justice. Thus, for instance, in cases of a deficiency of assets to pay all debts and legacies, if any of the legatees have been paid more than their proportion, before all the debts are ascertained, they may be compelled to refund and contribute, in favor of the unpaid debts, at the instance of creditors, at the instance of other legatees, and in many cases, although not universally, at the instance of the executor himself.[4]

[1] Robinson *v.* Wilson, 2 Madd. 437.—In the case of a Crown debtor, a surety is substituted to the prerogative of the Crown in regard to the debt, and then is admitted to use the Crown remedies. The King *v.* Bennet, Wightwick, R. 2 to 6; Ante, § 499 to 499 *d*, and notes.

[2] Hayes *v.* Ward, 4 Johns. Ch. R. 130; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 413, 414; Stevens *v.* Cooper, 1 Johns. Ch. R. 430; Miller *v.* Ord, 2 Bin. 382; Aldrich *v.* Cooper, 8 Ves. 388, 391, 395; Ex parte Rushforth, 10 Ves. 409; Wright *v.* Morley, 11 Ves. 22.

[3] 1 Eq. Abridg. p. 93, K. 5. See also Com. Dig. Chancery, 4 D. 6.

[4] Ante, § 90, 92; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 2, p. 364; Id. B. 3, Pt. 2, ch. 5, p. 518; Noel *v.* Robinson, 1 Vern. 94, and Mr. Raithby's notes, ibid.; Walcott *v.* Hall, 2 Bro. Ch. R. 305; Anon. 1 P. Will. 495, and Mr. Cox's note; Newman *v.* Barton, 2 Vern. 265, and Mr. Raithby's note; Edwards *v.* Freeman, 2 P. Will. 447; Hardwick *v.* Wynd, 1 Anst. 112; Davis *v.* Davis, 1 Dick. R. 32; Jewson *v.* Grant, 3 Swanst. R. 659; Com. Dig. Chancery, 3 V. 6. See also, on the subject of contribution, the Reporter's note to Averall *v.* Wade, Lloyd & Gould, Rep. 264; Ante, § 492.

§ 504. In like manner, contribution lies between partners for any excess, which has been paid by one partner beyond his share, against the other partners, if upon a winding up of the partnership affairs, such a balance appears in his favor; or, if, upon a dissolution, he has been compelled to pay any sum, for which he ought to be indemnified. The cases in which a recovery can be had at law by way of contribution between partners are very few, and stand upon special circumstances. The usual, and, indeed, almost the only effectual remedy is in Equity, where an account of all the partnership transactions can be taken; and the remedy to ascertain and adjust the balance is, in a just sense, plain, adequate and complete.[1] It is under the same circumstances, that an action of account at the Common Law lies; but that, as we have already seen, is in most cases a very cumbersome, inconvenient, and tardy remedy. The same remark applies to an action of covenant on sealed articles of partnership, or an action of assumpsit upon unsealed articles, where there have been any breaches of the articles; for there may be many breaches of them, during the continuance of the partnership, which scarcely admit of adequate redress in this way.[2] This subject will, however, hereafter present itself in a more enlarged form.[3]

§ 505. Contribution also lies between joint tenants,

[1] See Collyer on Partnership, ch. 8, § 2, 4, p. 143, 157, 162; Gow on Partn. ch. 2, § 3, 4, p. 92 to 141. See Wright *v.* Hunter, 1 East, R. 20; Wells *v.* Hubbell's Administrators, 2 Johns. Ch. R. 397; Wright *v.* Hunter, 5 Ves. 792.

[2] See Duncan *v.* Lyon, 3 Johns. Ch. R. 362; Neven *v.* Speckerman, 12 Johns. R. 401; Gow on Partn. ch. 2, § 3, p. 92; Dunham *v.* Gillis, 8 Mass. R. 462.

[3] Post, § 659 to 683; Story on Partn. § 219 to 242.

tenants in common, and part-owners of ships and other chattels, for all charges and expenditures incurred for the common benefit. But it seems unnecessary to dwell upon these cases, and others of a like nature, as they embrace nothing more than a plain application of principles already fully expounded.[1] We may conclude this head with the remark, that the remedial justice of Courts of Equity, in all cases of apportionment and contribution, is so complete, and so flexible in its adaptation to all the particular circumstances and equities, that it has, in a great measure, superseded all efforts to obtain redress in any other tribunals.

§ 506. LIENS also give rise to matters of account; and although this is not the sole, or, indeed, the necessary ground of interference of Courts of Equity, yet, directly or incidentally, it becomes a most important ingredient in the remedial justice administered by them in cases of this sort. The subject, as a general head of Equity Jurisdistion, will more properly fall under discussion in another place. But a few considerations, touching matters of account involved in it, may be here glanced at. A Lien is not in strictness either a *jus in re*, or a *jus ad rem;* but it is simply a right to possess and retain property, until some charge attaching to it is paid or discharged.[2] It generally exists in favor of artisans and others, who have bestowed labor and services upon the property, in its repair, improvement, and preservation.[3] It has also an existence, in many other

[1] Com. Dig. Chancery, 3 V. 6; Rogers *v.* Mackenzie, 4 Ves. 752; Lingard *v.* Bromley, 1 V. & Beam. 114.

[2] Brace *v.* Duchess of Marlborough, 2 P. Will. 491; Gilman *v.* Brown, 1 Mason, R. 221; Ex parte Heywood, 2 Rose, R. 355, 357; Post, § 1215, 1216.

[3] Abbott on Shipping, Pt. 2, ch. 3, § 1, 17; Chase *v.* Westmore, 5 M. & Selw. 180.

cases, by the usages of trade; and in maritime transactions, as in cases of salvage and general average.[1] It is often created and sustained in Equity, where it is unknown at law; as in cases of the sale of lands, where a lien exists for the unpaid purchase-money.[2] It is not confined to cases of mere labor and services on the very property, or connected therewith; but it often is, by the usage of trade, extended to cases of a general balance of accounts, in favor of factors and others.[3] Now, it is obvious, that most of these cases must give rise to matters of account; and as no suit is maintainable at law for the property by the owner, until the lien is discharged, and as the nature and amount of the lien often are involved in great uncertainty, a resort to a Court of Equity, to ascertain and adjust the account, seems, in many cases, absolutely indispensable for the purposes of justice; since, if a tender were made at law, it would be at the peril of the owner; and, if it was less than the amount due, he would inevitably be cast in the suit, and be put to the necessity of a new litigation under more favorable circumstances. So, in many cases, where a lien exists upon various parcels of land, some parts of which have been afterwards sold to different purchasers, and the lien is sought to be enforced upon the lands of the purchaser, it may often become necessary to ascertain what parcels ought primarily to be subjected to the lien in exoneration of

[1] Abbott on Shipping, Pt. 2, ch. 3, § 1, 17; Pt. 3, ch. 3, § 11; Id. ch. 10, § 1, 2.

[2] Sugden on Vendors, ch. 12, § 1, p. 541 (7th edit.); Id. ch. 12, § 1, Vol. 2, p. 57, (9th edit.).

[3] Paley on Agency, ch. 2, § 3; Kruger *v.* Wilcocks, Ambler, R. 252, and Mr. Blunt's note; Green *v.* Farmer, 4 Burr. 2218.

others, and a bill for this purpose as well as for an account of the amount of the incumbrance, may be indispensable for the purposes of justice.[1] Cases of pledges present a similar illustration, whenever they involve indefinite and unascertained charges and accounts.

§ 507. Let us in the next place bring together some few cases involving accounts which may arise either from privity of contract or relation, or from adverse or conflicting interests.

§ 508. Under this head the jurisdiction of Courts of Equity in regard to RENTS AND PROFITS may properly be considered. A great variety of cases of this sort resolve themselves into matters of account, not only when they arise from privity of contract, but also when they arise from adverse claims and titles, asserted by different persons.[2] Between landlord and tenant accounts often extend over a number of years, where there are any special terms or stipulations in the lease, requiring expenditures on one side and allowances on the other. In such cases where there are any controverted claims, a resort to Courts of Equity is often necessary to a due adjustment of the respective rights of each party.[3]

§ 509. Mr. Fonblanque asserts that Courts of Equity when resorted to for the purpose of an account of mesne profits, will, in many cases, consult the principle of convenience; and will, therefore, sometimes decree it,

1 Skeel *v.* Sprager, 8 Paige, R. 182; Patty *v.* Pease, 8 Paige, R. 277; Post, § 634 *a*, 1233 *a*, where the marshalling of securities and priority as to contributions is more fully considered.

2 See 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*k*); Id. B. 1, ch. 1; Id. B. 1, ch. 1, § 3, note (*f*) Bac. Abridg. *Accompt*, B.

3 O'Conner *v.* Spaight, 1 Sch. & Lefr. 305. See The King *v.* The Free Fishers of Whitstable, 7 East, R. 353, 356.

where the party has not already established his right at law.[1] To some extent, as in cases of shareholders in real property of a peculiar nature, (such as shareholders in the New River Water-works in England,) he is borne out by authority. But there is great reason to question whether the doctrine is generally admissible as a rule in Equity, resulting from mere convenience.[2] It seems rather to result from the peculiar character of the property where there are many proprietors, in the nature of partners, having a common title to the profits; and, therefore, the whole becomes appropriately a matter of account.[3]

§ 510. But another class of cases is still more frequent, arising from tortious or adverse claims and titles.[4] Thus, where a judgment creditor or a conusee of a recognizance or other statute security has had his execution levied upon the real estate of the judgment debtor or conusor; it may often be necessary to take an account of the rents and profits, in order to ascertain whether, and when, the debt has been satisfied, by a perception of those rents and profits.[5] At law, the tenant under an *Elegit* is not bound to answer in account, except for the extended value. But, in Courts of Equity, as the *Elegit* is a mere security for the debt, the tenant will be compelled to account for the

[1] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*).

[2] Townsend *v.* Ash, 3 Atk. 336. See Pulteney *v.* Warren, 6 Ves. 91, 92; Norton *v.* Frecker, 1 Atk. 524, 525.

[3] Adley *v.* Whitstable Comp. 17 Ves. 324; Lorimer *v.* Lorimer, 5 Madd. R. 369.

[4] Bac. Abridg. *Accompt*, B. — The gradual development of Equity Jurisdiction in cases of tort and mesne profits arising under contracts, trusts, and torts, is well stated in Bac. Abridg. *Accompt*, B.

[5] Yates *v.* Hambley, 2 Atk. 362, 363; Owen *v.* Griffith, Ambl. R. 520; S. C. 1 Ves. 250.

rents and profits, which he has actually received, deducting, of course, all reasonable charges.[1]

§ 511. It is observable that, in these cases of *Elegit*, there exists a privity in law; and there is an implied trust between the parties. In the ordinary cases of mesne profits, where a clear remedy exists at law, Courts of Equity will not interfere, but will leave the party to his remedy at law. Some special circumstances are, therefore, necessary, to draw into activity the remedial interference of a Court of Equity;[2] and, when these exist, it will interfere, not only in cases arising under contract, but in cases arising under direct or constructive torts. Thus, for instance, if a man intrudes upon an infant's lands, and takes the profits, he is compellable to account for them, and will be treated as a guardian or trustee for the infant.[3] And this is but following out the rule of law in the like case; for so greatly does the law favor infants, that if a stranger enters into and occupies an infant's lands, he is compellable, at law, to render an account of the rents and profits, and will be chargeable as guardian or bailiff.[4]

[1] Owen *v.* Griffith, 1 Ves. 250; Yates *v.* Hambley, 2 Atk. 362, 363. See 3 Black. Comm. 418 to 420; Taylor *v.* Earl of Abingdon, Doug. R. 472; Com. Dig. *Execution*, C. 14.

[2] Tilley *v.* Bridges, Prec. Ch. 252; 1 Eq. Abridg. 285.

[3] Newburgh *v.* Bickerstaffe, 1 Vern. 295; Carey *v.* Bertie, 2 Vern. 342; Hutton *v.* Simpson, 2 Vern. 724; Lockey *v.* Lockey, Prec. Ch. 518, 129; 1 Eq. Abridg. 7 Pl. 10, 11; Id. 280, A.; Bennet *v.* Whitehead, 2 P. Will. 644; 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*k*); Dormer *v.* Fortescue, 3 Atk. 129, 130.

[4] Littleton, § 124; Co. Litt. 89 *b*, 90 *a*; Pultency *v.* Warren, 6 Ves. 88, 89; Com. Dig. *Accompt*, A. 2; Dormer *v.* Fortescue, 3 Atk. 129, 130; Curtis *v.* Curtis, 2 Bro. Ch. 628, 632; Townsend *v.* Ash, 3 Atk. 337.

§ 512. Other cases may be easily put where a like remedial justice is administered in Equity. But, in all these cases, it will be found that there is some peculiar equitable ground for interference, such as fraud, or accident, or mistake, the want of a discovery, some impediment at law, the existence of a constructive trust, or the necessity of interposing to prevent multiplicity of suits.[1] It is perfectly clear, that, if there is a trust estate, and the *cestui que trust* comes into equity upon his title to recover the estate, he will be decreed to have the further relief of an account of the rents and profits.[2] So, in the case of bond creditors who come in for a distribution of assets; they may have an account of rents and profits against the heir in equity; for it is clear that they have an Equity, and yet they are without remedy at law.[3] So, in the case of dower, (of which more will presently be said,) if the widow is entitled to dower, and her claim is merely upon a legal title; but she cannot ascertain the lands out of which she is dowable, and comes into Equity for discovery and relief; she will be entitled to an account of the rents and profits, upon having her title established.[4] So if an heir or devisee is compelled to come into Equity for a discovery of title deeds and the ascertainment of his title, or to put aside some impediments to his recovery; there he will be entitled to an account of the rents and profits.[5]

[1] Ibid.; and Sayer *v.* Pierce, 1 Ves. 232; Curtis *v.* Curtis, 2 Bro. Ch. R. 628, 632, 633; Tilley *v.* Bridges, Prec. Ch. 252.

[2] Dormer *v.* Fortescue, 3 Atk. 129; Coventry *v.* Hall, 2 Ch. Rep. 259.

[3] Curtis *v.* Curtis, 2 Bro. Ch. R. 628, 629, 633.

[4] Ibid.; Curtis *v.* Curtis, 2 Brown, Ch. R. 620; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*k*).

[5] Dormer *v.* Fortescue, 3 Atk. 124; Coventry *v.* Hall, 2 Ch. Rep. 259; Bennet *v.* Whitehead, 2 P. Will. 644; Pulteney *v.* Warren, 6 Ves, 88,

§ 513. Another case illustrative of the same doctrine, as connected with torts, is, where a recovery has been had in an ejectment, brought to recover lands, and afterwards the plaintiff is prevented from enforcing his judgment by an injunction, obtained on a bill brought by the tenant, who dies before the bill is finally disposed of. In such a case, at law, the remedy by an action of trespass for the mesne profits is gone by the death of the tenant, as actions of tort do not survive at law. But a Court of Equity will, in such a case, entertain a bill for an account of the mesne profits, in favor of the plaintiff in ejectment, against the personal representatives of the tenant; for it is inequitable that his estate should receive the benefit and profits of the property of another person. It would be a reproach to Equity, if a man, who has taken the property of another, and disposed of it in his lifetime, should, by his death, throw the proceeds into his own assets, and leave the injured party remediless.[1] It is true, that the death of the tenant cannot be treated as the case of an accident, against which a Court of Equity will relieve.[2] But there seems the most manifest justice in holding, that, where property or its proceeds has come to the use of a party, the mere fact that the title has originated in a tort should not prevent the party, and his personal representatives, from rendering an account thereof. And, in truth, this is but following out the principles now adopted in Courts of Law, where the action for a tort dies with the person; but the right of

[1] Bishop of Winchester *v.* Knight, 1 P. Will. 407; Lansdowne *v.* Lansdowne, 1 Madd. R. 116.

[2] Pulteney *v.* Warren, 6 Ves. 88; Garth *v.* Cotton, 3 Atk. 755; S. C. 1 Ves. 524; Id. 546.

property in the thing, or its proceeds, survives against the personal representatives.[1]

§ 514. There is also another distinct ground, which, although not always followed out by the Courts of Equity in England, is, of itself, sufficient to maintain the jurisdiction; and that is, that in these cases a discovery is sought; and, if it is effectual, then, to prevent multiplicity of suits, the Court ought to decree at once the payment of the mesne profits, which have been thus ascertained.[2] But a definite and very satisfactory ground to maintain the jurisdiction in such cases is, that it is inequitable that a party, who suspends the just operation of a suit or judgment by an injunction, should thereby deprive the other party of his rights and profits, belonging to the suit or judgment, if the merits turn out to be ultimately in favor of the latter. He ought, under such circumstances, to be compelled to put the plaintiff in the original suit in the same situation as if no injunction had intervened.[3]

§ 515. Cases of WASTE by tenants and other persons afford another illustration of the same doctrine.[4] Thus,

[1] Hambley *v.* Trott, Cowp. R. 371; Lansdowne *v.* Lansdowne, 1 Madd, R. 116.—There are recent statutes, both in England and America, which alter the Common Law in this respect. But this change has not taken away the original jurisdiction in Equity.

[2] See Jesus College *v.* Bloom, 3 Atk. 262; S. C. Ambler, R. 54; Whitfield *v.* Bewit, 2 P. Will. 240; S. C. 3 P. Will. 267; Dormer *v.* Fortescue, 2 Atk. 282; S. C. 3 Atk. 124; Townsend *v.* Ash, 3 Atk. 336, 337.

[3] Pulteney *v.* Warren, 6 Ves. 88, 92.

[4] We here speak of *legal* waste; for, if the waste be equitable only of course a remedy lies in Equity. Lansdowne *v.* Lansdowne, 1 Madd. R. 116; Marquis of Ormond *v.* Kynersley, 5 Madd. R. 369. [In Kingham *v.* Lee, 15 Sim. 396, the case of Marquis of Ormond *v.* Kynersley, was disapproved.] An injunction to stay waste will lie in favor of one tenant in common against another. Hawley *v.* Clowes, 2 Johns. Ch. R. 122.

where one held customary lands of a manor, and opened a copper mine in the lands, and dug the ore, and sold great quantities of it in his lifetime, and then died, and his heir continued digging and disposing of the ore in like manner; upon a bill brought against the executor for an account, and against the heir also for an account, it was decided, that the bill was maintainable, both against the executor and the heir. Lord Cowper seems to have entertained the jurisdiction upon general principles, and especially upon the ground that the tenant was a sort of fiduciary of the lord; and it was against conscience, that he should shelter himself or his representative from responsibility for a breach of trust in a Court of Equity.[1]

§ 516. This case has been supposed to have been decided upon the ground that, as to the executor, there was no remedy at law; and that as to the heir, there was some fraud or concealment, and a necessity for a discovery; or that, as to him, an injunction was sought. Without some one of these ingredients, it would be difficult to maintain the case in its apparent extent; for there would otherwise be a complete and perfect remedy at law. And in the latter commentaries upon this case, this has been the distinctive ground upon which its authority has been admitted.[2] Lord Hardwicke seems to have thought, that it being the case of a mine might distinguish it from other cases of waste; as the digging of mines is a sort of trade; and then it would

[1] Bishop of Winchester *v.* Knight, 1 P. Will. 407; S. C. 2 Eq. Abridg. 226.

[2] Pulteney *v.* Warren, 6 Ves. 89, 90; Jesus College *v.* Bloom, 3 Atk. 262; S. C. Ambler, R. 54.

fall within the general doctrine, as to an account in matters of trade.[1]

§ 517. Cases of waste, by the cutting down of timber by tenants, have given rise to questions of the same sort, in regard to jurisdiction. In some of the cases upon this subject it seems to have been maintained, that, although the remedy for waste is ordinarily at law, yet if a discovery is wanted, that alone, if it turns out to be important, and is obtained, will carry the ulterior jurisdiction to account, in order to prevent multiplicity of suits;[2] a ground, the sufficiency of which it seems difficult to resist upon general principles.[3] But other decisions, and those, which are relied on, as constituting the established doctrine of the Court, are differently qualified; and seem to require, in order to maintain the jurisdiction for an account, that there should be a prayer for an injunction to prevent future waste.[4]

§ 518. Lord Hardwicke, upon one occasion,[5] expounded this ground of jurisdiction very clearly, (although he does not seem himself afterwards to have been satisfied with so limiting it,[6]) and said: "Waste is a loss for which there is a proper remedy by action. In a Court of Law the party is not necessitated to

1 Jesus College *v.* Bloom, 3 Atk. 262; S. C. Ambler, R. 54; Story *v.* Lord Windsor, 2 Atk. 630; Sayer *v.* Pierce, 1 Ves. 232.

2 Whitfield *v.* Bewit, 2 P. Will. 240; Garth *v.* Cotton, 3 Atk. 766; S. C. 1 Ves. 524, 546; Lee *v.* Alston, 1 Bro. Ch. R. 194; Eden on Injunct. ch. 9, p. 206, &c.

3 See Barker *v.* Dacie, 6 Ves. 688; Jeremy on Eq. Juriad. B. 3, Pt. 2, ch. 5, p. 510.

4 See Pulteney *v.* Warren, 6 Ves. 89, 90; Gherson *v.* Eyre, 9 Ves. 89; Richards *v.* Noble, 3 Meriv. R. 673. But see Lansdowne *v.* Lansdowne, 1 Madd. R. 116; Eden on Injunct. ch. 9, p. 206, &c.

5 4 Eng. Law & Eq. R. 95.

6 See Garth *v.* Cotton, 3 Atk. 756; S. C. 1 Ves. 524, 546.

bring an action of waste, but he may bring trover. These are the remedies; and, therefore, there is no ground of Equity to come into this Court. For satisfaction of damages is not the proper ground for the Court to admit of these sorts of bills, but the staying of waste; because the Court presumes, when a man has done waste, he may do the same again; and, therefore, will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time for an account of the waste done. And it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done, at the same time with an injunction. Just like the case of a bill for a discovery of assets; an account may be prayed for at the same time. And though, originally, the bill was only brought for a discovery of assets, yet, to prevent a multiplicity of suits, the Court will direct an account to be taken."[1] Now, if this reasoning be well founded, either in itself or upon the analogy of the case put of assets, it goes clearly to show that, where discovery is sought, and is obtained, there, also, to prevent multiplicity of suits, an account ought to be decreed, without the additional

[1] Jesus College *v.* Bloom, Ambler, R. 54; S. C. 3 Atk. 262; Pulteney *v.* Warren, 6 Ves. 89; Bishop *v.* Church, 2 Ves. 104; Yates *v.* Hambley, 2 Atk. 362; Watson *v.* Hunter, 5 Johns. Ch. R. 169; Smith *v.* Cooke, 3 Atk. 381. — It may be said, that on a bill for a discovery of assets, an account is necessary to ascertain the assets; and when taken, the Court ought to proceed to decree satisfaction, in order to prevent multiplicity of suits. But precisely the same thing may occur on a bill for an account of waste. Before the waste can be ascertained, it may be indispensable to have an account; and, when taken, the Court ought to proceed to decree satisfaction. In Jesus College *v.* Bloom, (Ambl. R. 54,) the term was gone by an assignment to another tenant, and no injunction was asked as to future waste.

ingredient of an injunction to stay future waste. And Lord Thurlow seems to have acted upon this ground.[1]

§ 519. In regard to TITHES, also, and, incidentally, to MODUSES and other compositions, Courts of Equity in England exercise an extensive jurisdiction of an analogous nature.[2] There is a very ancient jurisdiction in the Court of Exchequer in the matter of Tithes. Lord Nottingham is said to have stated, that the jurisdiction in the Exchequer over Tithes by bill in Equity is not earlier than the reign of Henry VIII., and that it took its rise from the statute of augmentations in his reign (33 Hen. VIII. ch. 39).[3] But other persons assert that it had a more early origin; and, in respect to extra-parochial tithes, which are a part of the ancient inheritance of the Crown, they insist that suits for tithes must always have fallen within the compass of the direct and substantial jurisdiction of the Court of Exchequer, as a Court of Revenue; and that the proper jurisdiction of Tithes belongs there.[4] Be this as it may, the jurisdiction of the Court of Chancery over the same subject seems to have been of a much later origin, or at least to have been matter of doubt and controversy to a much later period; the jurisdiction not having been firmly established until after the restoration of Charles II.[5] The Court of Chancery

[1] Lee *v.* Alston, 1 Bro. Ch. R. 194, 195; S. C. 1 Ves. jr. 78. See also Eden on Injunct. ch. 9, p. 206, &c.; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

[2] Com. Dig. Chancery, 3 C; Id. Dismes. M. 13; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 1.

[3] Harg. note to Co. Litt. 159 *a*, note 290; Anon. 1 Freem. R. 303.

[4] Harg. note to Co. Litt. 159 *a*, note 290; Anon. 1 Freem. R. 303; Hardcastle *v.* Smithson, 3 Atk. 247.

[5] Ibid.; Anon. 1 Freem. R. 203; Anon. 2 Ch. Cas. 337; S. C. 2 Freem. R. 27; 1 Madd. Ch. Pr. 84.

has ever since been held to have a concurrent jurisdiction with the Court of Exchequer.[1] This concurrent jurisdiction in both Courts is now generally considered to be merely incidental and collateral, arising from the general equitable jurisdiction of these Courts in matters of account, and in compelling a discovery.[2] And, therefore, wherever the right to Tithes is clearly established, an account is consequential; for it would be otherwise impossible to give full effect to that right, unless upon a discovery and account.[3] If the right is disputed, it must be first ascertained at law before an account will be decreed.[4] Indeed, it may be truly said, that in all matters of Tithes, a Court of Equity is far more competent than a Court of Law to administer an appropriate remedy.[5]

§ 520. Courts of Equity in England will not only enforce an account in cases of Tithes, but they will also exercise jurisdiction to establish a Modus, or composition, in cases where the party insisting on the Modus has been disturbed by proceedings at law, or in Equity, or in the Ecclesiastical Courts as to tithes; but not otherwise. The peculiarities belonging to the law of Tithes, and the doctrines respecting Moduses, are the less important to be dwelt on in this place, because they do not in any important manner illustrate any of the general doctrines of Equity; but they turn

[1] Bacon, Abridg. *Tythes*, B. 6; Com. Dig. Chancery, 3 C.; Id. Dismes. M. 13.

[2] 3 Black. Comm. 437; Co. Litt. 159 *a*, Hargrave's note, 290; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 510, 511.

[3] Foxcraft *v.* Parris, 5 Ves. 221; 1 Madd. Ch. Pr. 84 to 88; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5. p. 210, 511.

[4] Ibid.; Hughes *v.* Davies, 5 Sim. R. 349.

[5] Mitford, Pl. Eq. 125, by Jeremy; Pulteney *v.* Warren, 6 Ves. 89.

upon considerations eminently of an ecclesiastical nature, and are more suitable for a general treatise on Tithes.[1]

§ 521. Having passed under review some of the principal heads of Equity Jurisdiction in matters of account, which do not require a very elaborate examination, or belong to subjects which peculiarly illustrate the nature of it, we may conclude this examination with some few matters which appropriately belong to the head of Account, and are incident to the exercise of this remedial jurisdiction in all its forms.

§ 522. In the first place, in all bills in Equity for an account, both parties are deemed actors when the cause is before the Court upon its merits. It is upon this ground that the party defendant, contrary to the ordinary course of Equity proceedings, is entitled to orders in a cause to which a plaintiff alone is generally entitled. As, for instance, in such a case, a defendant may have an order for a *ne exeat regno*, even against a co-defendant.[2] So it is a general rule that no person but a plaintiff can entitle himself to a decree. But in bills for an account, if a balance is ultimately found in favor of the defendant, he is entitled to a decree for such balance against the plaintiff. And for a like reason, although a defendant cannot ordinarily revive a suit, which has not proceeded to a decree; yet, in a bill for an account, if the plaintiff dies after an interlocutory decree to account, the defendant is entitled to

[1] Earl of Coventry *v.* Burslem, 2 Anst. R. 567, note; Gordon *v.* Simpkinson, 11 Ves. 509; Stawell *v.* Atkyns, 2 Anst. R. 504; 1 Madd. Ch. Pr. 202; Mayor of York *v.* Pilkington, 1 Atk. 282, 283; Warden, &c., of St. Paul's *v.* Morris, 9 Ves. 155. See also Whaley *v.* Dawson, 2 Sch. & Lefr. 370, 371; Daws *v.* Benn, 1 Jac. & Walk. 493.

[2] Done's case, 1 P. Will. 263.

revive the suit against the personal representatives of the plaintiff.[1] And if the defendant dies, his personal representatives may revive the suit against the plaintiff.[2] The good sense of the doctrine seems to be that, wherever a defendant may derive a benefit from further proceedings, whether before or after a decree, he may be said to have an interest in it, and consequently ought to have a right to revive it.[3]

§ 523. In the next place there are some matters of defence, either peculiarly belonging to cases of account, or strikingly illustrative of some of the principles already alluded to, under the head of Accident, Mistake, or Fraud. Thus, it is ordinarily a good bar to a suit for an account, that the parties have already in writing stated and adjusted the items of the account, and struck the balance.[4] In such a case a Court of Equity will not interfere; for under such circumstances, an *indebitatus assumpsit* upon an *insimul computassent* lies at law, and there is no ground for resorting to Equity. If, therefore, there has been an account stated, that may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown, which calls for the interposition of a Court of Equity.[5]

[1] 1 Eq. Abridg. 3 Pl. 5; Anon. 3 Atk. 691, 692; Ludlow *v.* Simond, 2 Cain. Err. 39; Lord Stowell *v.* Cole, 2 Vern. 219, and Mr. Raithby's note; Harwood *v.* Schmedes, 12 Ves. 316.

[2] Kent *v.* Kent, Prec. Ch. 197.

[3] Williams *v.* Cooke, 10 Ves. 406; Harwood *v.* Schmedes, 12 Ves. 311, 316.

[4] Dawson *v.* Dawson, 1 Atk. 1; Taylor *v.* Hayling, 2 Bro. Ch. R. 310; Johnson *v.* Curtis, cited 2 Bro. Ch. R. 310, Mr. Belt's note; S. C. 3 Bro. Ch. 266, and Mr. Belt's note; Burk *v.* Brown, 2 Atk. 397, 399; Sumner *v.* Thorpe, 2 Atk. 1; Story on Equity Plead. § 798 to 802.

[5] Ibid.; Dawson *v.* Dawson, 1 Atk. 1; Anon. 2 Freeman, R. 62; Chambers *v.* Goldwin, 9 Ves. 265, 266; Taylor *v.* Hayling, 1 Cox, R. 435;

But, if there has been any mistake or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a Court of Equity will not suffer it to be conclusive upon the parties; but will allow it to be opened and reëxamined.[1] In some cases, as of gross fraud, or gross mistake, or undue advantage or imposition, made palpable to the Court, it will direct the whole account to be opened, and taken *de novo*.[2] In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or stain all the items of the transaction, the Court will content itself with a more moderate exercise of its authority.[3] It will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it; the effect of which is, to leave the account in full force and vigor, as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes.[4] Sometimes a still more mode-

S. C. 3 Bro. Ch. R. 310; Chappedelaine *v.* Dechenaux, 4 Cranch, R. 306; Perkins *v.* Hart, 11 Wheat. R. 237; Story on Equity Plead. § 798 to 802.

[1] A settled account between client and attorney, or between other persons standing in confidential relations to each other, will be more readily opened than any others; and even, it is said, upon general allegations of error, without any specific errors being pointed out; where the answer admits errors. Matthews *v.* Wolwyn, 4 Ves. 125; Newman *v.* Payne, 2 Ves. jr. 199. See also Beaumont *v.* Boultbee, 5 Ves. 485; Story on Eq. Plead. § 800; Todd *v.* Wilson, 9 Beavan, R. 486.

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Vernon *v.* Vawdry, 2 Atk. 119; Barrow *v.* Rhinelander, 1 Johns. Ch. R. 550; Piddock *v.* Brown, 3 P. Will. 288; Wharton *v.* May, 5 Ves. 27, 48, 49; Story on Equity Plead. § 800 to 802; Clarke *v.* Tipping, 9 Beavan, R. 284.

[3] Ibid.; Johnson *v.* Curtis, 2 Bro. Ch. R. 310, Mr. Belt's note; S. C. 3 Bro. Ch. R. 266, Mr. Belt's note.

[4] Pitt *v.* Cholmondeley, 2 Ves. 565, 566; Perkins *v.* Hart, 11 Wheat. R. 237; Story on Equity Plead. § 801, 802.

rate course is adopted; and the account is simply opened to contestation, as to one or more items, which are specially set forth in the bill of the plaintiff, as being erroneous or unjustifiable; and, in all other respects, it is treated as conclusive.[1]

§ 524. When, upon a bill to open a stated account, liberty is given to surcharge and falsify, the cause is referred to a Master. The examination of the account then takes place before him, and upon his report the Court finally acts; for in matters of account it never acts directly, but only through the instrumentality of a Master, by whom the whole matter is thoroughly sifted. The liberty to surcharge and falsify includes not only an examination of errors of fact, but of errors of law.[2]

§ 525. These terms, "surcharge" and "falsify" have a distinct sense in the vocabulary of Courts of Equity, a little removed from that which they bear in the ordinary language of common life. In the language of common life we understand "surcharge" to import an overcharge in quantity, or price, or value, beyond what is just, correct, and reasonable. In this sense it is nearly equivalent to "falsify;" for every item which is not truly charged as it should be, is false; and, by establishing such overcharge, it is falsified. But in the sense of Courts of Equity, these words are used in contradistinction to each other. A surcharge is appropriately applied to the balance of the whole account; and supposes credits to be omitted, which ought to be

[1] Brownell *v.* Brownell, 2 Bro. Ch. R. 62, 63; Consequa *v.* Fanning, 3 Johns. Ch. R. 587; S. C. 17 Johns. R. 511; Twogood *v.* Swanston, 6 Ves 484, 486.

[2] Roberts *v.* Kuffin, 2 Atk. 112.

allowed. A falsification applies to some item in the debits; and supposes that the item is wholly false, or in some part erroneous. This distinction is taken notice of by Lord Hardwicke; and the words used by him are so clear that they supersede all necessity for farther commentary. "Upon a liberty to the plaintiff to surcharge and falsify," says he, "the *onus probandi* is always on the party having that liberty; for the Court takes it as a stated account, and establishes it. But, if any of the parties can show an omission, for which credit ought to be, that is a *surcharge*; or if any thing is inserted that is a wrong charge, he is at liberty to show it, and that is a *falsification*. But that must be by proof on his side. And that makes a great difference between the general cases of an open account, and where [leave] only to surcharge and falsify; for such must be made out." [1]

§ 526. What shall constitute, in the sense of a Court of Equity, a stated account, is in some measure dependent upon the particular circumstances of the case. An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause, that errors are excepted.[2] But in order to make an account a stated account, it is not necessary that it should be signed by the parties.[3] It is sufficient if it has been examined and accepted by both parties. And this acceptance need not be express; but may be implied from circumstances.[4] Between merchants at home, an

[1] Pitt *v.* Cholmondeley, 2 Ves. 565, 566. See also Perkins *v.* Hart, 11 Wheat. R. 237, 256.

[2] See Johnson *v.* Curtis, cited 2 Brown, Ch. R. 310; 3 Brown, Ch. R. 266, and Mr. Belt's notes.

[3] Willis *v.* Jernegan, 2 Atk. 251, 252.

[4] Ibid.

account which has been presented, and no objection made thereto after the lapse of several posts, is treated under ordinary circumstances, as being, by acquiescence, a stated account.[1] Between merchants in different countries, a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other, and no objection is made after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted; and, therefore, it is deemed a stated account.[2] In truth, in each case, the rule admits or rather requires the same general exposition. It is, that an account rendered shall be deemed an account stated, from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time.[3] That reasonable time is to be judged of in ordinary cases, by the habits of business at home and abroad; and the usual course is required to be followed unless there are special circumstances to vary it, or to excuse a departure from it.

§ 527. Upon like grounds, *à fortiori*, a settled account will be deemed conclusive between the parties, unless some fraud, mistake, omission, or inaccuracy is shown. For it would be most mischievous, to allow settled accounts between the parties, especially where vouchers have been delivered up or destroyed, to be unravelled, unless for urgent reasons, and under cir-

[1] Sherman *v.* Sherman, 2 Vern. 276; S. C. 1 Eq. Abridg. 12 Pl. 10, 11; Irving *v.* Young, 1 Sim. & Stu. 333.

[2] Willis *v.* Jernegan, 2 Atk. 252; Tickel *v.* Short, 2 Ves. R. 239; Murray *v.* Toland, 3 Johns. Ch. R. 569, 575; Freeland *v.* Heron, 7 Cranch, 147.

[3] Ibid; Com. Dig. Chancery, 2 A. 3.

cumstances of plain error, which ought to be corrected.[1] And, in cases of settled accounts, the Court will not generally open the account; but will, at most, only grant liberty to surcharge and falsify, unless in cases of apparent fraud.[2]

§ 528. In regard to acquiescence in stated accounts, although it amounts to an admission, or presumption of their correctness, it by no means establishes the fact of their having been settled, even though the acquiescence has been for a considerable time. There must be other ingredients in the case to justify the conclusion of a settlement.[3]

§ 529. It is, too, a most material ground, in all bills for an account, to ascertain whether they are brought to open and correct errors in the account *recenti facto*; or whether the application is made after a great lapse of time. In cases of this sort, where the demand is strictly of a legal nature, or might be cognizable at law, Courts of Equity govern themselves by the same limitations as to entertaining such suits, as are prescribed by the statute of limitations in regard to suits in Courts of Common Law in matters of account. If, therefore, the ordinary limitation of such suits at law be six years, Courts of Equity will follow the same period of limitation.[4] In so doing, they do not act, in

[1] Brownell *v.* Brownell, 2 Bro. Ch. R. 62; Taylor *v.* Haylin, 2 Bro. Ch. R. 310; Johnson *v.* Curtis, cited 2 Bro. Ch. R. 310; S. C. 3 Brown, Ch. R. 266, Mr. Belt's notes; Chambers *v.* Goldwin, 8 Ves. 837, 838; Pitt *v.* Cholmondeley, 2 Ves. 566.

[2] Vernon *v.* Vawdry, 2 Atk. 119; Chambers *v.* Goldwin, 8 Ves. 265, 266; Drew *v.* Power, 1 Sch. & Lefr. 192.

[3] Lord Clancarty *v.* Latouche, 1 B. & Beatt. R. 428; Irving *v.* Young, 1 Sim. & Stu. 333.

[4] Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 629; Smith *v.* Clay, 3 Brown, Ch. R. 639, n.

cases of this sort (that is, in matters of concurrent jurisdiction,) so much upon the ground of analogy to the statute of limitations, as positively in obedience to such statute.[1] But, where the demand is not of a legal nature, but is purely equitable; or where the bar of the statute is inapplicable; Courts of Equity have another rule, founded sometimes upon the analogies of the law, where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands, and not to encourage laches, and negligence.[2] Hence in matters of account, although not barred by the statute of limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost, and from the consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *Vigilantibus, non dormientibus, jura subveniunt.*[3] Under peculiar circumstances,

[1] Hovenden *v.* Lord Annesley, 2 Sch. & Lefr. 629, 630, 631; Spring *v.* Gray, 5 Mason, R. 527, 528; Sherwood *v.* Sutton, 5 Mason, R. 143, 146; Ante, § 55 *a.*

[2] Sherman *v.* Sherman, 2 Vern. R. 576; S. C. 1 Eq. Abridg. 12; Bridges *v.* Mitchell, Bunb. 217; S. C. Gilb. Eq. R. 217; Foster *v.* Hodgson, 19 Ves. 180, 184; Sturt *v.* Mellish, 2 Atk. 610; Pomfret *v.* Lord Windsor, 2 Ves. 472, 476, 477; Bond *v.* Hopkins, 1 Sch. & Lefr. 428; Smith *v.* Clay, Amb. R. 647; 3 Bro. Ch. R. 639, note; Stackhouse *v.* Barnston, 10 Ves. 466, 467; Moore *v.* White, 6 Johns. Ch. R. 360; Rayner *v.* Pearsall, 3 Johns. Ch. R. 578; Lewis *v.* Baird, 3 McLean, 83; Creath *v.* Sims, 5 How. S. R. 192; Ray *v.* Bogart, 2 Johns. Cas. 432; Ellison *v.* Moffat, 1 Johns. Ch. R. 46; Sherwood *v.* Sutton, 4 Mason, R. 143, 146; Robinson *v.* Hook, 4 Mason, R. 139, 150, 152; Piatt *v.* Vattier, 9 Peters, R. 405; Willison *v.* Watkins, 3 Peters, R. 44; Miller *v.* McIntire, 6 Peters, R. 61, 66; 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes; Brownell *v.* Brownell, 2 Bro. Ch. R. 62.

[3] 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes; Jeremy on Eq. Jurisd. B.

however, excusing or justifying the delay, Courts of Equity will not refuse their aid in furtherance of the rights of the party; since in such cases, there is no pretence to insist upon laches or negligence, as a ground for dismissal of the suit.[1]

3, Pt. 2, ch. 5, p. 549, 550; 1 Madd. Ch. Pr. 79, 80; Holtscomb *v.* Rivers, 1 Ch. Cas. 127; Jasan *v.* Toulmin, 9 Ala. 662. — Mr. Fonblanque's collection of principles and authorities to illustrate this doctrine is very comprehensive, and characterized by his usual acuteness and strong sense. 1 Fonbl. Eq. B. 1, ch. 4, § 27, and notes. Mr. Jeremy, also upon this subject, has given us a very ample and discriminating collection of authorities. Jeremy on Eq. Jurisd B. 3, Pt. 2, ch. 5, p. 549, 550.

[1] Lopdell *v.* Creagh, 1 Bligh, (N. S.) 255.

CHAPTER IX.

ADMINISTRATION.

§ 530. HAVING thus gone over some of the more important cases in which matters of account are involved, as the principal, and sometimes as the exclusive ground of jurisdiction, we shall now take leave of this part of the subject, and proceed to the consideration of other branches of concurrent jurisdiction in Equity; in which, although accounts are sometimes involved, yet the jurisdiction is derived from, or essentially connected with, other sources of jurisdiction; and accounts, whenever taken, are mere incidents to other relief.

§ 531. And in the first place, the jurisdiction of Courts of Equity in the Administration of the assets of deceased persons. The word, assets, is derived from the French word *assez*, which means sufficient, or enough; that is sufficient, or enough, in the hands of the executor or administrator to make him chargeable to the creditors, legatees, and distributees of the deceased, so far as the personal property of the deceased extends, which comes to the hands of the executor or administrator for administration. In an accurate and legal sense, all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed assets.[1]

[1] 2 Black. Comm. 510; Toller on Executors, B. 2, ch. 1, p. 137.

But the word is not confined to such property; for all other property of the deceased, which is chargeable with his debts or legacies, and is applicable to that purpose, is, in a large sense, assets.[1]

§ 532. It has been said that the whole jurisdiction of Courts of Equity, in the administration of assets, is founded on the principle, that it is the duty of the Court to enforce the execution of trusts; and that the executor or administrator who has the property in his hands, is bound to apply that property to the payment of debts and legacies; and to apply the surplus according to the will of the testator, or in case of intestacy, according to the Statute of Distributions. So that the sole ground, on which Courts of Equity proceed in cases of this kind, is to be deemed the execution of a trust.[2]

§ 533. This is certainly a very satisfactory foundation on which to rest the jurisdiction in many cases; for, under many circumstances, as an execution of a trust, the subject would be properly cognizable in Equity, and especially if the party would not be chargeable at law, since it is the ordinary reason for a Court of Equity to grant relief, that the party is remediless at law. It has also been truly said, that the only thing inquired of in a Court of Equity is, whether the property, bound by a trust, has come into the hands of persons who are either bound to execute

[1] 2 Black. Comm. 244, 340; Toller on Ex'ors, B. 3, ch. 8, p. 409.

[2] Adair *v.* Shaw, 1 Sch. & Lefr. 262. See also Farrington *v.* Knightley, 1 P. Will. 548, 549; Rachfield *v.* Careless, 2 P. Will. 161; Duke of Rutland *v.* Duchess of Rutland, 2 P. Will. 210, 211; Elliot *v.* Collier, 1 Ves. 16; Anon. 1 Atk. 491; Wind *v.* Jekyll, 2 P. Will. 575; Nicholson *v.* Sherman, 1 Cas. Ch. 57; Bac. Abridg. *Legacy*, M.; 1 Madd. Ch. Pr. 466, 467.

the trust, or to preserve the property for the persons entitled to it. If we advert to the cases on the subject, we shall find that trusts are enforced, not only against those persons who are rightfully possessed of trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust. And whosoever so comes into possession, is considered as bound, with respect to that special property, to the execution of the trust.[1]

§ 534. Certainly, to no persons can these considerations more appropriately apply than to executors and administrators, and those claiming under them, with notice of the administration and assets. But, if it were the sole ground of sustaining the jurisdiction, that it is the case of a trust cognizable in Equity alone, it would follow that instead of being a matter of concurrent jurisdiction, it would be a matter belonging to the exclusive jurisdiction of Equity. For, although Equity does not purport to entertain jurisdiction of all trusts; some of them, such as cases of bailments, being ordinarily cognizable at law;[2] yet, of such trusts as are peculiar to Courts of Equity, the jurisdiction is exclusive in such Courts. Now, we all know, that both the Courts of Common Law and the Ecclesiastical Courts have cognizance of administrations; and many suits respecting the administration of assets, are daily entertained therein. Courts of Equity, therefore, in assuming general jurisdiction over cases of administration, do, indeed, in some measure, found themselves

[1] Ibid.

[2] Black. Comm. 431, 432; 1 Woodeson, Lect. vii., p. 208, 209.

upon the notion of a constructive trust in the executors or administrators.[1] But the fact of there being a constructive trust is not the sole ground of jurisdiction. Other auxiliary grounds also exist; such as the necessity of taking accounts, and compelling a discovery;[2] and the consideration, that the remedy at law, when it exists, is not plain, adequate, and complete. The jurisdiction, therefore, now assumed by Courts of Equity to so wide an extent, over all administrations and the settlement of estates, in cases of testacy and intestacy is not, (as it should seem,) exclusively referable to the mere existence of a constructive trust (which is often sufficiently remediable at law); but it is referable to the mixed considerations already adverted to, each of which has a large operation in Equity.[3]

§ 535. A little attention to the nature of the jurisdiction exercised in the Courts of Common Law and the Ecclesiastical Courts, in cases of administrations, will abundantly show the necessity of the interposition of Courts of Equity. In the first place, in suits at Common Law, nothing more can be done than to establish the debt of the creditor; and if there is any controversy as to the existence of the assets, and a discovery is wanted; or, if the assets are not of a legal nature; or, if a marshalling of the assets is indispensable to a due payment of the creditor's claim; it is obvious that the remedy at law cannot be effectual. But there may be other interests injuriously affected by the judgment of a Court of Common Law in a suit

[1] Bac. Abridg. *Legacy*, M.

[2] Com. Dig. Chancery, 2 A. 1; 3 Black. Com. 98.

[3] See Mitford, Pl. Eq. by Jeremy, pp. 125, 126, 136.

by a creditor, which injury that Court could not redress or prevent; but which Courts of Equity could completely redress or prevent.

§ 536. In the next place, as to the Ecclesiastical Courts. They have, it is true, an ancient jurisdiction over the probate of wills, and the granting of administrations; and as incident thereto, an authority to enforce the payment of legacies of personal property.[1] But, by the Common Law, although an executor was compellable to account before the Ordinary or Ecclesiastical Judge, and so was an administrator; yet the Ordinary was to take the account, as given in by the executor or administrator, and could not oblige him to prove the items of it, or to swear to the truth of it.[2]

§ 537. The Statute of 31st of Edward III., ch. 11, put executors and administrators upon the same footing, as to accounting for assets; but it, in no manner whatsoever, changed the mode of accounting by either of them.[3] A legatee might falsify the account of an executor or administrator in the Spiritual Court, as may also the next of kin, since the Statute of Distributions of 22d and 23d of Car. II., ch. 10. But a creditor of the estate could not falsify the account in the Ecclesiastical Court, for his proper remedy was held to be at the Common Law.[4] By the Statute of 21st of Henry

[1] 2 Black. Comm. 494; 3 Black. Comm. 98; Bac. Abridg. *Legacies*, M.; 2 Fonbl. Eq. B. 4, ch. 1, § 1, and notes; Marriott *v.* Marriott, 1 Str. Rep. 666.

[2] 2 Fonbl. Eq. B. 4, ch. 3, § 2, and note (*d*): Archbishop of Canterbury *v.* Wills, 1 Salk. 315.

[3] Ibid.; 2 Black. Com. 496; 4 Burns, Eccles. Law, *Wills, Distribution, Account*, viii, p. 368; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*).

[4] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*); Hinton *v.* Parker, 8 Mod. 168; Catchside *v.* Ovington, 3 Burr. R. 1922; Archbishop of Canterbury *v.* Wills, 1 Salk. 315.

VIII., ch. 5, § 4, executors and administrators were bound to deliver an inventory of the effects of the deceased, upon oath, to the Ordinary. But the inventory could not be controverted in the Ecclesiastical Courts by a creditor; but only by a legatee.[1] Even an administration bond will not be broken by an omission to pay a creditor's debt; but it is a security merely for those who are interested in the estate.[2] Indeed, before the Statute of Distributions, it was a matter greatly debated, whether an administrator could be compelled to make any distribution of an intestate's estate; and for a great length of time, it was held, that an executor was in all cases entitled to the personal estate of his testator, not disposed of by his will.[3]

§ 538. The jurisdiction of the Ecclesiastical Courts being so manifestly defective in the case of creditors, resort was almost necessarily had to Courts of Equity, to compel a discovery of assets and an account. And, where a creditor did not seek a general settlement of the estate, by a suit in behalf of himself and all other creditors, still he was entitled to a discovery in Courts of Equity, to enable him to recover his own debt in an action at law.[4]

§ 539. In regard to legatees, also, the remedy was

[1] Hinton *v.* Parker, 8 Mod. 168; Catchside *v.* Ovington, 3 Burr. 1922; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2. — Mr. Fonblanque is in an error, when he says, "The inventory could not be controverted in the Spiritual Court." The authorities cited by him show, that it could be by a legatee, but not by a creditor. 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2.

[2] Archbishop of Canterbury *v.* Wills, 1 Salk. 315; Greenside *v.* Benson, 3 Atk. 248, 252; Ashley *v.* Baillie, 3 Ves. 268; Wallis *v.* Pipon, Ambler, R. 183; Archbishop of Canterbury *v.* House, Cowp. R. 140; Thomas *v.* Archbishop of Canterbury, 1 Cox, R. 399.

[3] 2 Black. Comm. 514, 515; Toller on Ex'ors, B. 3, ch. 6, p. 369.

[4] Com. Dig. Chancery, 2 C. 3; Id. 3 B. 1, 2.

in many cases quite as defective. No remedy lies at the Common Law, in cases of pecuniary legacies;[1] and although (as has been stated) a remedy does lie in the Spiritual Courts; yet, in a great variety of cases, that remedy is insufficient and imperfect. Thus, if payment of a legacy should be pleaded to a suit in the Ecclesiastical Courts; and there is but one witness of the fact, (which the Ecclesiastical Courts will not admit as sufficient proof, for their law requires two,) there the Temporal Courts will grant a prohibition to further proceedings.[2] So, if a husband should sue for a legacy in the Ecclesiastical Courts, the Court of Chancery will prohibit him; because the Ecclesiastical Courts cannot compel him to make any settlement on his wife, in consideration of the legacy.[3] So, if a legacy is due to an infant, the Court of Chancery will interfere, at the instance of the executor, and prevent the Spiritual Courts from proceeding, because the executor may be entitled to a bond to indemnify him, and to refund in case of a deficiency of assets.[4] Many other cases might be put of a like nature.

§ 540. But a stronger instance may be stated. If the testator does not dispose of the residue of his estate; and yet, from the circumstances of the will the executor is plainly not entitled to the residue there, he will be held liable to distribute it, as a trustee for the next of kin. But the Spiritual Courts have no juris-

[1] Decks *v.* Strutt, 5 Term. R. 690; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2.

[2] Bacon, Abridg. *Legacy*, M.; 3 Black. Comm. 112.

[3] Ibid.; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, and note (*d*).

[4] Horrell *v.* Waldron, 1 Vern. R. 26; Noel *v.* Robinson, 1 Vern. R. 91. But see Anon. 1 Atk. R. 491; Hawkins *v.* Day, Ambler, R. 162; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2.

diction whatsoever in such a case, to enforce a distribution; for trusts are not cognizable in those Courts, and cannot be enforced by them.[1] Even in the common case of a legacy of personal estate, the legacy does not vest in the legatee, until the executor assents to it; and, until he assents, it would seem not to be suable in the Spiritual Courts. But Courts of Equity consider the executor to be a trustee of the legatee, and will compel him to assent to and pay the legacy as a matter of trust.[2] And, if there are no legal assets to pay a legacy, although there are ample equitable assets, the Spiritual Courts cannot enforce payment of the legacy; for they have no jurisdiction over equitable assets.[3]

§ 541. In cases of distribution of the residue of estates, the remedy in the Spiritual Courts is also, on other accounts, exceedingly defective; for those Courts do not possess any adequate means for a perfect ascertainment of all the debts; or to compel a payment of them, when ascertained, so as to fix the precise residuum; or to protect the executor or administrator in his administration, according to their decree.[4] Besides, the interposition of a Court of Equity may be required for many other purposes, before a final settlement and distribution of the estate; as, for instance, to compel an executor to bring the funds into Court, or to give security for the payment of debts, legacies, and distributive shares, where there is danger of insolvency, or he is

[1] Farrington *v.* Knightley, 1 P. Will. 545, 548.

[2] Wind *v.* Jekyll, 1 P. Will. 575.

[3] Barker *v.* May, 9 B. & Cressw. 489. See, also, Paschall *v.* Ketterich, Dyer, 151 *b*; Edwards *v.* Graves, Hob. R. 265; Bac. Abridg. *Legacy*, M.

[4] See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 3, § 2, note (*d*); Id. B. 4, Pt. 1, ch. 1, § 2, and note (*d*).

wasting the assets, or where the debts, legacies, and distributive shares are not presently payable, or payment cannot be presently enforced.[1]

§ 542. The jurisdiction of Courts of Equity to superintend the administration of assets, and decree a distribution of the residue, after payment of all debts and charges, among the parties entitled, either as legatees, or as distributees, does not seem to have been thoroughly established until near the close of the reign of Charles II. The objection was then made, that the Spiritual Courts had full authority, under the Statute of Distributions, to decree a distribution of the residue. But, upon a demurrer filed to a bill for a distribution, it was held by the Lord Chancellor, that, there being no negative words in the Act of Parliament, (the Statute of Distributions,) the jurisdiction of the Court of Chancery was not taken away; for the remedy in Chancery was more complete and effectual than that in the Spiritual Courts; or, to use the language of the Court upon that occasion, the Spiritual Court in that case had but a lame jurisdiction.[2] And, although ordinarily, in cases of concurrent jurisdiction, the decree of the Court first having possession of the cause, is held conclusive; yet Courts of Chancery have not held themselves bound by decrees of the Spiritual Courts in

[1] See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*); Duncumban *v.* Stint, 1 Ch. Cas. 121; Strange *v.* Harris, 3 Bro. Ch. R. 365; Blake *v.* Blake, 2 Sch. & Lefr. 26.

[2] Matthews *v.* Newby, 1 Vern. 133; Howard *v.* Howard, 1 Vern. 134; Buccle *v.* Atleo, 2 Vern. R. 37; Gibbons *v.* Dawley, 2 Ch. Cas. 198; Pamplin *v.* Green, 2 Ch. Cas. 95; Lord Winchelsea *v.* Duke of Norfolk, 2 Ch. R. 367; 2 Fonbl. Eq. B. 4, ch. 1 § 2; Digby *v.* Cornwallis, 3 Ch. R. 72; Petit *v.* Smith, 1 P. Will. 7; 1 Madd. Ch. Pr. 467.

cases of distribution, from their supposed inability to do entire justice.[1]

§ 543. For a great length of time, the usual resort has been to the Court of Chancery, to settle the administration of estates; so that, practically speaking, in cases of any complication or difficulty, it has acquired almost an exclusive jurisdiction. In many cases, indeed, besides those, which have been already mentioned, it is impossible for any other Court than a Court of Equity to administer full and satisfactory justice among all the parties in interest; and especially, where equitable assets are to be administered, or the assets are to be marshalled; as we shall abundantly see in the farther progress of these Commentaries.

§ 544. The application for aid and relief in the administration of estates is sometimes made by the executor or administrator himself, when he finds the affairs of his testator or intestate so much involved, that he cannot safely administer the estate, except under the direction of a Court of Equity. In such a case, it is competent for him to institute a suit against the creditors generally, for the purpose of having all their claims adjusted, and a final decree, settling the order and payment of the assets.[2] These are sometimes called Bills of Conformity (probably because the executor or administrator in such case undertakes to conform to the decree, or the creditors are compelled by the decree to conform thereto); and they are not

[1] See Bissell *v.* Axtell, 2 Vern. 47, and Mr. Raithby's note; 1 Eq. Abridg. E. p. 136, Pl. 2, 3, 4.

[2] Com. Dig. Chancery, 3 G. 6; Buccle *v.* Atleo, 2 Vern. 37. See Rush *v.* Higgs, 4 Ves. jr., 638, 643; Jackson *v.* Leap, 1 Jac. & Walk. 231; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 4, note (*u*).

encouraged, because they have a tendency to take away the preference which one creditor may gain over another by his legal diligence. Besides; it has been said, that these bills may be made use of by executors and administrators, to keep creditors out of their money longer than they otherwise would be.[1] However correct these reasons may be for a refusal to interfere in ordinary cases, involving no difficulty, they are not sufficient to show, that the Court ought not to interfere in behalf of an executor, or administrator under special circumstances, where injustice to himself, or injury to the estate, may otherwise arise.[2]

§ 545. A doubt has, indeed, been suggested, whether a bill can be maintained against all the creditors.[3] But, if the bill is brought against certain known creditors, who are proceeding at law, it may be asked, What is the difficulty of proceeding in the same way as is done as to all creditors, upon a bill brought by one or more creditors in behalf of themselves and all other creditors? Upon a decree for the executor or administrator to account, all the creditors are, or may be required to present and prove their debts before the Master in the first case, as they are now required to do in the last case. But, upon such a bill, brought by an executor or administrator, the Court will not interpose, by way of injunction, to prohibit creditors proceeding at law, until there has been a decree against the executor or administrator to account in that suit; for, other-

[1] Morrice *v.* Bank of England, Cas. Temp. Talb. 224; Blackwell's case, 1 Vern. 153, 155; 1 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 3, note (*u*).

[2] Com. Dig. Chancery, 3 G. 6.

[3] Rush *v.* Higgs, 4 Ves. jr., 638, 643.

wise, the latter might without reason make it a ground of undue delay of the creditors.[1]

§ 546. But the more ordinary case of relief, sought in Equity in cases of administration, is by creditors. A creditor may file his bill for payment of his own debt, and seek a discovery of assets for this purpose only. If he does so, and the bill is sustained, and an account is decreed to be taken, the Court will upon the footing of such an account, proceed to make a final decree in favor of the creditor, without sending him back to law for the recovery of his debt; for this is one of the cases in which a Court of Equity, being once in rightful possession of a cause for a discovery and account, will proceed to a final decree upon all the merits.[2] Upon a bill thus brought by a single creditor for his own debt only, no general account of debts is usually directed to be taken; but the common course is, to direct an account of the personal estate, and of that particular debt, which is ordered to be paid in the due course of administration.[3]

[1] Ibid.

[2] Attorney-General *v.* Cornthwaite, 2 Cox, 44. See McKay *v.* Green, 3 Johns. Ch. R. 58; Thompson *v.* Brown, 4 Johns. R. 619, 630 to 643; Morrice *v.* Bank of England, Cas. Temp. Talb. 220.

[3] Attorney-General *v.* Cornthwaite, 2 Cox, R. 44; Morrice *v.* Bank of England, Cas. Temp. Talb. 217; Anon. 3 Atk. 572; Perry *v.* Phelips, 10 Ves. 38. — Although this is the usual course, in the case of a creditor seeking an account and payment of his own debt only; it is not, therefore, to be considered that the Court itself is absolutely incompetent, upon such a bill, to make a more general decree in the form of a decree upon a general creditor's bill. On the contrary, a case may be made out upon the answer and proofs, which might render it if not indispensable, at least highly expedient for the purposes of justice, to adopt the latter course. See Ram. on Assets, &c., ch. 24, § 2; Martin *v.* Martin, 1 Ves. 213, 214; Shephard *v.* Kent, Prec. Ch. 190, 193; S. C. 2 Vern. 435; Anon. 3 Atk.

§ 547. The more usual course, however, pursued in the case of creditors, is for one or more creditors to file a bill (commonly called a Creditor's Bill,) by and in behalf of him, or themselves, and all other creditors who shall come under the decree, for an account of the assets, and a due settlement of the estate.[1] And this applies as well when the party suing is a creditor whose debt is payable *in presenti*, as when his debt is due *in futuro*, if it be *debitum in presenti, solvendum in futuro*;[2] and whether he has a mortgage or not.[3] Bills of this sort have been allowed upon the mere principle that, as executors and administrators have vast powers of preference at law, Courts of Equity ought, upon the principle that equality is Equity, to interpose upon the application of any creditor by such a bill, to secure a distribution of the assets, without preference to any one or more creditors.[4] And, as a decree in Equity is held of equal dignity and importance with a judgment at law, a decree upon a bill of this sort, being for the benefit of all creditors, makes them all creditors by decree upon an equality with creditors by judgment, so as to exclude, from the time of such decree, all preferences in favor of the latter.[5]

572; Perry *v.* Phelips, 10 Ves. 38, 40, 41; Rush *v.* Higgs, 4 Ves. 638; Thompson *v.* Brown, 4 Johns. Ch. R. 610, 630, 643, 646.

1 See the case of The Creditors of Sir Charles Cox, 3 P. Will. 343.

2 Whitmore *v.* Oxborn, 2 Younge & Coll. (N. R.) 13, 17.

3 Greenwood *v.* Firth, 2 Hare, R. 241, note; Aldridge *v.* Westbrook, 5 Beav. R. 138; Shey *v.* Bennet, 2 Younge & Coll. (N. R.) 405; White *v.* Hillacre, 3 Younge & Coll. 597, 609, 610; Story, Eq. Pl. § 101, 158.

4 Rush *v.* Higgs, 4 Ves. jr., 638, 643; Gilpin *v.* Lady Southampton, 18 Ves. 469; Martin *v.* Martin, 1 Ves. 210; Thompson *v.* Brown, 4 Johns. Ch. R. 619, 630, 643.

5 Ibid; Morrice *v.* Bank of England, Cas. T. Talb. 217; Perry *v.* Phelips, 10 Ves. 38, 39, 40; Brooks *v.* Reynolds, 1 Bro. Ch. R. 183;

§ 548. The usual decree in the case of Creditor's Bills against the executor or administrator is (as it is commonly phrased) *quod computet*, that is to say, it directs the Master to take the accounts between the deceased and all his creditors; and to cause the creditors, upon due public notice to come before him to prove their debts, at a certain place, and within a limited period; and it also directs the Master to take an account of all the personal estate of the deceased in the hands of the executor or administrator; and the same to be applied in payment of the debts and other charges, in a due course of administration.[1] In all cases of this sort, each creditor is entitled to appear before the Master, and may there, if he chooses, contest the claim of any other creditor, in the same manner as if it were an adversary suit.[2]

§ 548 *a*. But although the usual decree is as above stated upon a bill by a creditor in behalf of himself and all other creditors, this decree is not applicable, (as it seems,) to cases where the executor or administrator admits assets; for he thereby admits himself liable for the payment of the debt; and in such a case the plaintiff may have a decree for the payment of his own debt only, without any decree for a general account; for the other creditors are not prejudiced by

Paxton *v.* Douglass, 8 Ves. 520; Thompson *v.* Brown, 4 Johns. Ch. R. 619.

[1] Van Heythuysen, Eq. Draft. Title, *Decrees*, p. 647; The Creditors of Sir Charles Cox, 3 P. Will. 343; Sheppard *v.* Kent, Prec. Ch. 190; S. C. 2 Vern. 435; Kenyon *v.* Worthington, 2 Dick. R. 668; Thompson *v.* Brown, 4 Johns. Ch. R. 619.

[2] Owens *v.* Dickenson, 1 Craig & Phill. 48, 56. See as to the form of a decree in an administration suit, in case all the parties interested should not be parties at the hearing, Fisk *v.* Norton, 2 Hare, R. 381.

such a decree for the payment of the plaintiff's debt, under such circumstances.[1]

§ 549. As soon as the decree to account is made in such a suit, brought in behalf of all the creditors, and not before, the executor or administrator is entitled to an injunction out of Chancery, to prevent any of the creditors from suing him at law, or proceeding in any suits already commenced, except under the direction and control of the Court of Equity, where the decree

[1] Woodgate *v.* Field, 2 Hare, R. 211, 212. Mr. Vice-Chancellor Wigram on that occasion said: "The reason for, and the principle of the usual form of decree, are stated in Owens *v.* Dickenson, (Cr. & Ph. 43,) but that reasoning has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for payment of the plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails. I entertained no doubt upon this point, nor can I, upon inquiry, find that it was ever doubted in the other branches of the Court. In effect, the rule is proved by the fact that the creditor and defendant, the executor, may settle the matter pending the suit, by the latter paying the debt and costs of the suit. And it has twice been decided at the Rolls, that the Court will order the same thing to be done, even when the suit had proceeded to a considerable extent. If then the Court would compel a creditor to accept payment of his debt when the executor offers to pay it, with the costs of suit, where is the line to be drawn, beyond which the plaintiff cannot be allowed to have the exclusive benefit of his own suit. I am satisfied that in this case there ought to be a decree for immediate payment. It was objected, however, that in Sterndale *v.* Hankinson, Sir A. Hart said that, on the filing of a creditor's bill, every creditor has an inchoate right in the suit; the meaning of that expression is, that a right then commences which may indeed fail, but may also be perfected by decree; and it is not inaccurately called an inchoate right. After the decree every creditor has an interest in the suit; but the question is, whether the plaintiff, until decree, is not *dominus litis*, so that he may deal with the suit as he pleases. There is nothing to prevent other creditors from filing bills for a like purpose; and there is nothing more common than for several suits to exist together, and the Court permits them to go on together until a decree in one of them is obtained, because it is possible, before the decree, that the litagiting creditor may stop his suit.

is passed.[1] The object of the Court, under such circumstances, is to compel all the creditors to come in and prove their debts before the Master; and to have the proper payments and discharges made under the authority of the Court; so that the executor or administrator may not be harrassed by multiplicity of suits, or a race of diligence be encouraged between different creditors, each striving for an undue mastery and preference.[2] And this action of the Court presupposes, that all the legal rights of every creditor and the validity of his debt may be, and, indeed, must be, determined in Equity, upon the same principles as it would be at law.[3] But in order to prevent any abuse of such bills,

[1] Morris *v.* Bank of England, Cas. Temp. Talb. 217; Martin *v.* Martin, 1 Ves. 211, 212; Perry *v.* Phelips, 10 Ves. 38, 39; Brooks *v.* Reynolds, 1 Bro. Ch. R. 183, and Mr. Belt's note; Douglas *v.* Clay, 1 Dick. R. 393; Kenyon *v.* Worthington, 2 Dick. R. 668; Paxton *v.* Douglas, 8 Ves. 520; Jackson *v.* Leap, 1 Jac. & Walk. 231, and note; McKay *v.* Green, 3 Johns. Ch. 58; Burles *v.* Popplewell, 10 Sim. R. 383. See Underwood *v.* Hatton, 5 Beav. R. 31.

[2] Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 538 to 543.

[3] Whitaker *v.* Wright, 2 Hare, R. 310. On this occasion Mr. Vice-Chancellor Wigram said, "With respect to the form of a decree in a creditors' suit, — the Court does not treat the decree as conclusive proof of the debt. It is clear, that it is not so treated for all purposes; for any other creditor may challenge the debt, Owens *v.* Dickenson (1 Cr. & Ph. 48); and it is equally clear, that in practice, the executor himself is allowed to impeach it. If, in a case where the plaintiff sues on behalf of himself and all the other creditors, and the defendants, who represent the estate, do not admit assets, (see Woodgate *v.* Field,) it is objected at the hearing, that the debt is not well proved, — the Court tries the question only whether there is sufficient proof upon which to found a decree; and however clearly the debt may be proved in the cause, the decree decides nothing more than that the debt is sufficiently proved to entitle the plaintiff to go into the Master's office; and a new case may be made in the Master's office, and new evidence may be there tendered. The real question is, in what way the new case is to be tried, or what is the course to be pursued in the Master's office? The plaintiff says that the course should be the same as at law, and that he brings his legal rights with him

by connivance between an executor or administrator and a creditor, it is now a common practice to grant an injunction only, when the answer or affidavit of the executor or administrator states the amount of the assets, and upon the terms of his bringing the assets into Court, or obeying such other order of the Court, as the circumstances of the case may require.[1] The

into equity; and, subject to some qualification, I cannot refuse my assent to the plaintiff's proposition. When a decree is made in a creditor's suit, under which all the creditors may come in, this Court will not permit the estate to be embarrassed by proceedings which might conflict with each other, to the prejudice of the executor or administrator, Perry *v.* Phelips (10 Ves. 34); but nothing would be more unjust than that the Court should restrain the creditor from proceeding to enforce his rights at law, except upon the principle of allowing him to bring his legal rights with him into the office of the Court, which it substitutes for the proceedings at law, Dornford *v.* Dornford (12 Ves. 127); Berrington *v.* Evans (1 You. 276); and the circumstance, that the creditor is also the plaintiff in the suit in equity, makes no difference in that respect. The only qualifications which now occur to me of the general rule, that a legal creditor brings all his legal rights with him, are founded, first, upon the circumstance, that, in certain special cases, a court of equity, in the ordinary course of administering assets, will distinguish a voluntary bond from one given for value, Lady Cox's case (3 P. Wms. 339); Jones *v.* Powell (Eq. Cas. Abr. 84, pl. 2); Gilham *v.* Locke (9 Ves. 612); Assignees of Gardiner *v.* Shannon (2 Sch. & Lefr. 228); and, secondly, that in all cases, this Court requires an affidavit of the truth of the debt from the creditor, which at law is not required. This affidavit is required to extend to the consideration of a simple-contract debt, — but not to the consideration of bond or other specialty debts. The third qualification, — if, indeed, there be any other than those which I have mentioned, — is that which is said to be introduced by the case of Rundell *v.* Lord Rivers (Phillips, 88.)"

[1] Gilpin *v.* Lady Southampton, 18 Ves. 469; Clarke *v.* Ormonde, Jac. Rep. 122, 123, 124, 125; Mitford, Eq. Pl. by Jeremy, p. 311. In Lee *v.* Park, 1 Keen, R. 714, 719 to 724, Lord Langdale (Master of the Rolls) went into an elaborate examination of the doctrine on this subject, and refused to stay the execution of a creditor who had obtained a judgment before the decree to account in Chancery. Although it is long, yet it gives so full an account of the history, progress, and present state of the jurisdiction, that it seems proper to be here given at large. "It has been

same remedial justice is applied, where the application, instead of being made by creditors, is made by legatees or trustees.[1]

argued," says he, "that, in cases of this nature, the Court pays no regard to the question, whether the decree or judgment has priority in time, but considers only the quality of the judgment, and that the judgment in this case being a judgment to recover *de bonis testatoris*, the executors are, as of course, entitled to restrain the judgment creditors from issuing execution. I do not accede to that argument. The jurisdiction in these cases was first established upon questions which arose between judgments at law and decrees in Equity, for payment of ascertained debts out of the assets. It was determined, that such decrees and such judgments were, in the administration of legal assets, to be considered of equal value, and that the one which was prior in time (whether decree or judgment,) should be first satisfied out of the assets. Morrice *v.* The Bank of England, Cas. Temp. Talb 217; S. C. more fully, 3 Swanst. 575, and 2 Bro. P. C. 465, edit. Toml.; Martin *v.* Martin, 1 Ves. sen., 211. In the beginning, a judgment, obtained after a decree *quod computet*, (not being a decree for payment of an ascertained sum out of the assets,) was preferred. Ferrers *v.* Shirley, cited 10 Ves. 39. But subsequently, Lord Thurlow put the jurisdiction on this; — that the Court, having decreed an account of debts and assets, and ordered payment in a due course of administration, must be considered to have taken the fund into his own hands, and could not suffer its decree to be rendered nugatory by altering the course of administration, but ought to protect the executor in obeying its decrees. And, he, therefore, granted injunctions to restrain proceedings at law after a decree *quod computet*. Kenyon *v.* Worthington, 2 Dick. 668. And, as it was the practice in creditors' suits, for the plaintiff, suing for himself and others, to prove his own debt prior to the hearing, there was, perhaps, not much difficulty in considering a decree for the administration of assets in such a suit, as in the nature of a judgment for all the creditors. But Lord Thurlow, acting on the principle to which he attributed the jurisdiction, gave the like authority to a decree *quod computet*, which was obtained in a suit, instituted by the trustees under a testator's will, and to which no creditor was a party; Brooks *v.* Reynolds, 1 Bro. C. C. 183. It was, however, contended, that the creditor was not to be deprived of the benefit of a judgment, which he had obtained prior to the decree; Goate *v.* Fryer, 2 Cox, 201; Largan *v.* Bowen, 1 Sch. & Lefr. 296. In the case of Paxton *v.* Douglas, (8 Ves. 520,) the creditor had obtained an interlocutory judgment, prior to the application for an injunction. What was the state of the proceeding at law, at the date of the decree, is not

[1] Perry *v.* Phelips, 10 Ves. 38; Brooks *v.* Reynolds, 1 Bro. Ch. R. 183; Jackson *v.* Leap, 1 Jack. & Walker, 231, and note.

§ 550. The considerations already mentioned apply to cases, where the assets are purely of a legal nature; and no peculiar circumstances require the interposition

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stated; and no question on the subject appears to have been raised. In some subsequent cases, where the decree had priority in point of time, a question was raised, whether the executor, by improper pleading, or by confessing judgment, did not lose his right to be protected by an injunction; and, upon these cases it has been considered, that if the executor so pleaded as to entitle the creditor, plaintiff at law, to a judgment to recover his demand *de bonis propriis*, this Court could not restrain the execution; Brook *v.* Skinner, 2 Mer. 481, n.; Terrewest *v.* Featherby, 2 Mer. 480; Drewry *v.* Thacker, 3 Swanst. 529; Clarke *v.* Lord Ormonde, Jac. 108; Lord *v.* Wormleighton, Jac. 148., In the cases of Price *v.* Evans, (4 Sim. 514,) and Kent *v.* Pickering, (5 Sim. 569,) the Vice-Chancellor granted injunctions, which only restrained the creditor from taking out execution against the assets of the intestate or testator. But it has been held, that suffering judgment to go by default, or putting in pleas considered false, if done merely for the purpose of gaining time to apply to this Court, did not deprive the executor of his right to protection; Dyer *v.* Kearsley, 2 Mer. 482, n.; Fielden *v.* Fielden, 1 Sim. & Stu. 225. In a useful work on the Law of Executors, (Williams's Law of Executors, 1181,) it has been observed, that in the consideration of some of these cases, some misconception seems to have prevailed respecting the effect of the executor's pleas, and of the judgment against him; and considering what in the argument of this case has been called the quality of the judgment, it seems proper to notice, that a judgment against an executor, whether by default or on demurrer, or upon verdict on any plea pleaded, except a general or special *plene administravit*, is conclusive upon him, that he has assets to answer the demand; Leonard *v.* Simpson, 2 Bing. N. C. 176; Palmer *v.* Waller, 1 Mees. & Wel. 689. If the action can only be supported against him in his character of executor, and he pleads any plea which admits that he has acted as such (except a release to himself,) the judgment against him is, that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator, if the defendant have so much; but if not, then the costs out of the defendant's own goods. Such is the form of the judgment, where the defendant has pleaded *non est factum testatoris*, *non assumpsit*, or release to the testator, although all of these pleas are held to admit assets. But, upon a subsequent deficiency of assets, the executor has to pay out of his own goods, because in law, the judgment is held to be a proof that he had assets to satisfy it. Upon the sheriff's return of *nulla bona*, the plaintiff may issue a *scire facias*, or bring an action of debt on the judgment, suggesting a *devastavit*. In the proceed-

of Courts of Equity, except those appertaining to the necessity of taking an account, and having a discovery,

ings on the *scire facias*, the plaintiff has not to prove that the executor has property of the testator in his hands; and in the action the executor cannot plead *plene administravit*, but only deny the *devastavit;* and of that the judgment against him and the sheriff's return of *nulla bona* are evidence; and in his action the creditor obtains judgment to recover his demand *de bonis propriis*. The case of Drewry *v.* Thacker, (3 Swanst. 529,) is, as far as I am aware, the only case in which the executor has been in any degree protected against execution upon a judgment obtained prior to the decree. The administratrix, in that case, had given *cognovits* to Stanley and Lucas, two bond creditors, with stay of execution, if payment was made by instalments at certain times. After default had been made, a decree for administration was obtained, and, after the plaintiff at law had notice of the decree, the sheriff took the intestate's goods, in the hands of the administratrix, in execution. The Vice-Chancellor, Sir John Leach, ordered the sheriff to restore the goods on payment of costs; and further, that if, upon the administration of the estate by the Court, there should be a deficiency of assets to pay Stanley and Lucas in full, they were to be at liberty to proceed at law against the administratrix, as if the sheriff had returned *nulla bona praeter* the sum received by Stanley and Lucas upon the administration of the assets in this case, she by her counsel, undertaking not to dispute the suggestion of such return in the writ at law. Now, Lord Eldon, very recently before the date of this order, in the case of Terrewest *v.* Featherby, had observed, 'That the creditor's judgment would be of no service to him, if he were delayed here, until it could be ascertained whether there were assets of the testator to answer his demand, which might not be till after all chance of recovering against the executor *de bonis propriis* was entirely gone.' The order of the Vice-Chancellor in Drewry *v.* Thacker, did, however, so delay the creditor, and on a motion before Lord Eldon, to discharge the order, he seems to have found considerable difficulty in dealing with it. He clearly considered, that if the administratrix was liable at law, she was liable to a greater extent than she was left by the Vice-Chancellor's order; and that there had been no instance, where the proceedings at law had been restrained after judgment *de bonis testatoris*, and *si non de bonis propriis* of an executor, and execution issued on a decree subsequently obtained for an administration of the assets; and he said, that his memory furnished him with the recollection of no case, in which the Court had interposed, as in the Vice-Chancellor's order, namely, by restraining the proceedings at law for a time, but considering those proceedings effectual for some purposes, to be carried into execution at a future time, when the fruits to be collected from them had been ascertained by the result of certain proceedings in Equity. In the result he

and decreeing a final settlement of the estate. But, in a great variety of cases, the jurisdiction of Courts of Equity becomes indispensable, from the fact, that no other courts possess any adequate jurisdiction to reach the entire merits, or dispose of the entire merits. This must necessarily be the case, where there are equitable assets, as well as legal assets, and, also, where the assets are required to be marshalled, in order to a full and perfect administration of the estate, and to prevent any creditor, legatee or distributee, from being deprived of his own proper benefit by reason of any prior claims which obstruct it.

§ 551. And, first, in relation to equitable assets. That portion only of the assets of the deceased party are deemed legal assets, which by law are directly liable, in the hands of his executor or administrator, to the payment of debts and legacies.[1] It is not within the design of these Commentaries to enter into a minute examination of what are deemed legal assets. But, generally speaking, they are such as can be reached in the hands of an executor or administrator by a suit at

made no order upon the motion before him; so that the order of the Vice-Chancellor was in effect left undisturbed, but under circumstances which prevent it from being regarded as an authority. In the subsequent case of Clarke v. Lord Ormonde, (Jac. 108,) in which the point was not raised, Lord Eldon is reported to have said, that even if a creditor has got a judgment before a decree, though he may come in and prove as such, he must not take out execution; and in reference to the conduct of the parties, and perhaps to the nature of the claim, there may be such cases; but such is not the ordinary rule." See, also, Ranken v. Harwood, 5 Hare, R. 215.

[1] 1 Mad. Ch. Pr. 473; Ram on Assets, ch. 8, p. 143; Id. ch. 27, p. 317; 3 Wooddeson, Lect. 59, p. 482 to 488. See in the English Law Mag. for Feb. 1844, p. 27, a dissertation on what constitutes the true distinction and test between legal and equitable assets. See 2 White & Tudor's Eq. Lead. Cases, p. 72 and note.

law against him, either by a common judgment, or by a judgment upon a *devastavit* against him personally.[1] But it is perhaps, more accurate to say, that legal assets are such as come into the hands and power of an executor or administrator, or such as he is intrusted with by law, *virtute officii*, to dispose of in the course of administration.[2] In other words, whatever an executor or administrator takes, *qua* executor or administrator, or in respect to his office, is to be considered as legal assets.[3]

§ 552. Equitable assets are, on the other hand, all assets which are chargeable with the payment of debts or legacies in Equity; and which do not fall under the description of legal assets. They are called equitable assets, because, in obtaining payment out of them, they can be reached only by the aid and instrumentality of

[1] See Farres *v.* Newnham, 4 T. Rep. 621; Whale *v.* Booth, 4 T. Rep. 625, note; S. C. 4 Doug. R. 36.—In some cases, it is necessary to go into a Court of Equity, to enforce payment out of what are properly legal assets. Thus, for instance, if there should be a lease for years, or a bond debt, or an annuity in a trustee's name, belonging to the deceased, there, although a creditor could not come at it without the aid of a Court of Equity; yet the assets would be treated as legal assets, and should be applied in the course of administration as such. Wilson *v.* Fielding, 2 Vern. R. 763; The case of Sir Charles Cox's Creditor's, 2 P. Will. 342, 343; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*f*). So a term of years, taken in the name of A, in trust for B, is legal assets, although recoverable in Equity only. Ibid.; 3 P. Will. 342, 313, and Mr. Cox's note (2); Hartwell *v.* Chitters, Ambler, R. 308, and Mr. Blunt's note. By the Statute of Charles II., ch. 3, the trusts of an inheritance in land are liable for the payment of bond debts, which make such trust estates legal assets although they can be enforced only in Equity. See 2 Freeman, Rep. 150, C. 130; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*f*); Moses *v.* Murgatroyd, 1 Johns. Ch. R. 119, 130.

[2] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1; Bac. Abridg. *Executors and Administrators*, H.; 3 Wooddes. Lect. 59, p. 484 to 488.

[3] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and note (*e*); Deg *v.* Deg, 2 P. Will. 416, and Mr. Cox's note.

a Court of Equity.[1] They are also called equitable for another reason; and that is, that the rules of distribution by which they are governed, are different from those of the distribution of legal assets. In general it may be said, that equitable assets are of two kinds; the first is, where assets are created such by the intent of the party; the second is, where they result from the nature of the estate made chargeable. Thus, for instance, if a testator devises land to trustees, to sell for the payment of debts, the assets resulting from the execution of the trust, are equitable assets upon the plain intent of the testator, notwithstanding the trustees are also made his executors, for, by directing the sale to be for the payment of debts generally, he excludes all preferences, and the property would not otherwise be liable to the payment of simple contract debts.[2] The same principle applies, if the testator merely charges his lands with the payment of his debts.[3] On the other hand, if the estate be of an equitable nature, and be chargeable with debts, the fund is to be deemed equitable assets, unless by some statute it is expressly made legal assets; for it cannot be reached except through the instrumentality of a Court of Equity.[4] And it may be laid down as a general

[1] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, and notes (*c*), (*f*), (*g*); Wilson *v.* Fielding, 2 Vern. 763; Gott *v.* Atkinson, Willes, R. 523, 524; 1 Madd. Ch. Pr. 473; Ram on Assets, ch. 27, p. 317; 3 Wooddes. Lect. 59, p. 486, 487.

[2] Lewin *v.* Oakley, 2 Atk. 50; Newton *v.* Bennet, 1 Bro. Ch. R. 135; Silk *v.* Prime, 1 Bro. Ch. R. 138, note; Bailey *v.* Ekins, 7 Ves. 319; Shiphard *v.* Lutwidge, 8 Ves. 26, 30; Bentson *v.* Leroy, 4 Johns. Ch. R. 651; Clay *v.* Willis, 1 B. & Cressw. 364; Barker *v.* May, 9 B. & Cressw. 489.

[3] Ibid.

[4] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*g*).

principle, that every thing is considered as equitable assets, which the debtor has made subject to his debts generally, and which, without his act, would not have been subject to the payment of his debts generally.[1]

§ 552 *a*. Wherever real estate is by statute made liable for the payment of the debts of the deceased, there it constitutes legal assets.[2] But, notwithstanding such provision, if the testator should by his will charge his real estate with his debt, there the real estate so charged would be equitable assets.[3]

§ 553. In the course of the administration of assets, Courts of Equity follow the same rules in regard to legal assets, which are adopted by Courts of Law; and give the same priority to the different classes of creditors, which is enjoyed at law; thus maintaining a practical exposition of the maxim, *Æquitas sequitur legem*.[4] In the like manner, Courts of Equity recognize and enforce all antecedent liens, claims, and charges *in rem*,

[1] 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*e*); Ram on Assets, ch. 17, p. 317. — In Silk *v.* Prime, 1 Prime, 1 Bro. Ch. R. 138, note, Lord Camden took notice of the early cases, which had decided, that where land is devised to be sold by executors, *qua* executors, or devised to executors, *qua* executors, to be sold for payment of debts, the assets were purely legal (Co. Litt. 112 *b*, 113 *a*); and he added, "I can hardly now suggest a case where the assets would be legal, but where the executor has a naked power to sell, *qua* executor." See, also, Girling *v.* Lee, 1 Vern. R. 63, and Raithby's notes. It is questionable, whether, even in this latter case, the assets would now be held to be legal. See Barker *v.* May, 9 B. & Cressw. 489, 493; Paschall *v.* Ketterich, Dyer, R. 151 *b*; Anon. Dyer, R. 264 *b*; Bac. Abridg. *Legacy*, M.; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, note (*e*); Deg *v.* Deg, 2 P. Will. 416, Cox's note.

[2] Goodchild *v.* Ferret, 5 Beav. R. 398.

[3] Charlton *v.* Wright, 12 Simons, R. 274.

[4] See 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1, 2; Wride *v.* Clarke, 1 Dick. R. 382; Averell *v.* Loucks, 6 Barbour, S. C. R. 478; Morrice *v.* Bank of England, Cas. Temp. Talb. 220, 221.

existing upon the property according to their priorities; whether these charges are of a legal, or of an equitable nature, and whether the assets are legal or equitable.[1]

§ 554. But in regard to equitable assets, (subject to the exception already stated,) Courts of Equity in the actual administration of them, adopt very different rules from those adopted in Courts of Law in the administration of legal assets. Thus, in Equity, it is a general rule that equitable assets shall be distributed equally, and *pari passu*, among all the creditors, without any reference to the priority or dignity of the debts; for Courts of Equity regard all debts in conscience as equal *jure naturali*, and equally entitled to be paid; and here they follow their own favorite maxim that equality is Equity; *Æquitas est quasi æqualitas.*[2] And if the fund falls short, all the creditors are required to abate in proportion.[3]

§ 555. It frequently happens, also, that lands and other property, not strictly legal assets, are charged not only with the payment of debts, but also with the payment of legacies. In that case, all the legatees

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[1] Freemanult *v.* Dedire, 1 P. Will. 429; Finch *v.* Earl of Winchelsea, 1 P. Will 277, 278; Burgh *v.* Francis, 1 Eq. Abridg. 320, Pl. 1; Girling *v.* Lee, 1 Vern. 63, and Raithby's notes; Plunket *v.* Penson, 2 Atk. 290; Pope *v.* Gwinn, 8 Ves. 28, note; Morgan *v.* Sherrard, 1 Vern. 273; Cole *v* Warden, 1 Vern 410, and note; Wilson *v.* Fielding, 2 Vern. 763, 764; Foly's case, 2 Freem. R. 49; Wride *v.* Clarke, 1 Dick. R. 382; Sharpe *v* Earl of Scarborough, 4 Ves. 538.

[2] Co. Litt 24, Hixam *v.* Witham, 1 Cas. Ch. 248; Gott *v.* Atkinson, Willes, R 521; Turner *v* Turner, 1 Jac. & Walk. 45; Creditors of Sir Charles Cox, 3 P. Will. 343, 344; Deg *v.* Deg, 2 P. Will. 412, 416; Wride *v* Clarke, 1 Dick. 382; Morrice *v.* Bank of England, Cas. Temp. Talb. 220; Wilson *v.* Paul, 8 Sim. R. 63.

[3] Hixam *v.* Witham, 1 Freem. R. 301; S. C. 1 Ch. Cas. 248; Deg *v.* Deg, 2 P. Will. 412; Wride *v.* Clarke, 1 Dick. 382; Foly's case, 2

take, *pari passu;* and if the equitable assets (after payment of the debts) are not sufficient to pay all the legacies, the legatees are all required to abate in proportion, unless some priority is specially given by the testator to particular legatees; for, *primâ facie,* the testator must be presumed to intend that all his legacies shall be equally paid.[1] But, suppose the case to be, that the equitable assets are sufficient to pay all the debts; but, after such payment, not sufficient to pay any of the legacies; and the property is charged with the payment of both debts and legacies. In such a conflict of rights, the question must arise, whether the creditors and legatees are to share in proportion, *pari passu;* or the creditors are to enjoy a priority of satisfaction out of the equitable assets. This was formerly a matter of no inconsiderable doubt; and it was contended with much apparent strength of reasoning that, as both creditors and legatees, in such a case, take out of the fund by the bounty of the testator, and not of strict right, they ought to share in proportion, *pari passu.* After some struggle in the Courts of Equity upon this point,[2] it is at length settled that, although

Freem. 49; Woolstonecroft *v.* Long, 2 Freem. R. 175; S. C. 2 Eq Abridg. 459; 1 Cas. Ch. 32; 3 Ch. Rep. 12. — The Civil Law, like the Common Law, had different classes of debts, to which is annexed different privileges, or priorities, founded, indeed, upon principles more general and more sound than those of the Common Law, in its classification. There were in the Civil Law three orders of creditors. (1) Those who go before all others, and take priority among themselves according to the distinctions of their privileges. (2.) Those who have mortgages, and rank after the privileged creditors according to the dates of their respective mortgages. (3.) Those who are creditors by bonds, or others who have only personal actions, (the two first have liens or privileges, *in rem,*) and who come in therefore, together, and share equally in proportion to their debts. 1 Domat, B. 3, tit. 1, § 5, and especially, art. 34.

[1] Brown *v.* Brown, 1 Keen, R. 275.

[2] See Anon. 2 Vern. 133; Hixam *v.* Witham, 1 Cas. Ch. 248; S. C 1 Freem. R. 305; Anon. 2 Vern. 405; Walker *v.* Meager, 2 P. Will. 550.

as between themselves, in regard to equitable assets, the creditors are all equal, and are to share in proportion, *pari passu*; yet, as between them and legatees, the creditors are entitled to a priority and preference; and that legatees are to take nothing until the debts are all paid.

§ 556. The ground of this decision is, that it is the duty of every man to be just, before he is generous; and no one can well doubt the moral obligation of every man to provide for the payment of all his debts. The presumption, therefore, in the absence of all other words, showing a different intent, (which intent would in such a case still prevail,) is, that a testator means to provide first, for the discharge of his moral duties, and next, for the objects of his bounty, and not to confound the one with the other. For, otherwise, the testator would, in truth, and *in foro conscientiæ*, be disposing of another's debt, and not making gifts *ultra æs alienum*.[1] The good sense of this latter reasoning can scarcely escape observation. It proceeds upon the just and benignant interpretation of the intention of the party to fulfil his moral obligations in the just order, which natural law would assign to them.

§ 557. In cases where the assets are partly legal, and partly equitable, Courts of Equity will not interfere to take away the legal preference of any creditors to the legal assets. But, if any creditor has been partly paid out of the legal assets by insisting on his preference, and he seeks satisfaction of the residue of his

[1] Hixam *v.* Witham, 1 Cas. Ch. 258; S. C. 1 Freem. R. 305; Walker *v.* Meager, 2 P. Will. 551, 552; S. C. Moseley, R. 204; Petre *v.* Bruen, cited ibid; Greaves *v.* Powell, 2 Vern. R. 248, and Mr. Raithby's note (2); 1 Eq. Abridg. 141, Pl. 3; Kidney *v.* Coussmaker, 12 Ves. 154.

debt out of the equitable assets, he will be postponed, till all the other creditors, not possessing such a preference, have received out of such equitable assets an equal proportion of their respective debts.[1] This doctrine is founded upon, and flows from that which we have been already considering, that in natural justice and conscience all debts are equal; that the debtor himself is equally bound to satisfy them all;[2] and that equality is Equity. When, therefore, a Court of Equity is called upon to assist a creditor, it has a right to insist, before relief is granted, that he who seeks Equity shall do Equity; that he shall not make use of the law in his own favor to exclude Equity, and at the same time insist that Equity shall aid the defects of the law, to the injury of equally meritorious claimants. The usual decree in cases of this sort is, that "If any of the creditors by specialty have exhausted (or shall exhaust) any part of the testator's personal estate in satisfaction of their debts, then they are not to come upon or receive any farther satisfaction out of the testator's real estate (or other equitable assets) until the other creditors shall thereout be made up equal with them."[3] This is sometimes called marshalling the assets.[4] But that appellation more appropriately belongs (as we shall immediately see) to another mode of equitable interference. The present is rather an exercise of equitable

[1] Sheppard *v.* Kent, 2 Vern. R. 435; Deg *v.* Deg, 3 P. Will. 417; Haslewood *v.* Pope, 3 P. Will. 323; Morrice *v.* Bank of England, Cas. Temp. Talb. 220, 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1.

[2] Morrice *v.* Bank of England, Cas. Temp. Talb. 219, 220, 221; 2 Fonbl. Eq. B. 4, Pt. 2, ch. 2, § 1.

[3] Plunket *v.* Penson, 2 Atk. 294; Wride *v.* Clarke, 1 Dick. R. 382.

[4] See Aldrich *v.* Cooper, 8 Ves. 388, 394.

jurisdiction in refusing relief, unless upon the terms of doing Equity.

§ 558. In the next place, as to marshalling assets (strictly so called) in the course of administration.[1] In the sense of lexicographers, to marshal is to arrange or rank in order; and in this sense, the marshalling of assets would be, to arrange or rank assets in the due order of administration. This primary sense of the language has been transferred into the vocabulary of Courts of Equity; and has there received a somewhat peculiar and technical sense, although still german to its original signification. In the sense of Courts of Equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties, having equities thereon, to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds.[2] Thus, where there exist two or more funds, and there are several claimants against them, and at law one of the parties may resort to either fund for satisfaction, but the others can come upon one only; there, Courts of Equity exercise the authority to marshal (as it is called) the funds, and by this means enable the parties whose remedy at law is confined to one fund only, to receive due satisfaction.[3] The gene-

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[1] Aldrich *v.* Cooper, 8 Ves. 388, 394; Post, § 633 to 643.

[2] See 3 Wooddes. Lect. 59, p. 488, 489; Post, § 633 to 642.

[3] 1 Madd. Ch. Pr. 499; Ram on Assets, ch. 28, § 1, p. 329; Aldrich *v.* Cooper, 8 Ves. 388, 398; Lanoy *v.* Duke of Athol, 2 Atk. 446; In re Cornwall, 2 C. & L. 131; S. C. 3 Dru. & War. 173; Attorney-General *v.* Tyndall, Ambl. R. 614; 2 Fonbl. Eq. B. 3, ch. 2, § 6; Selby *v.* Selby, 4 Russ. R. 336, 341. See the Reporter's Note to Phillips *v.* Parker, 1 Tamlyn, R. 136, 143.

ral principle upon which Courts of Equity interfere in these cases is, that, without such interference, he who has a title to the double fund, would possess an unreasonable power of defeating the claimants upon either fund, by taking his satisfaction out of the other, to the exclusion of them. So that in fact, it would be entirely in his election, whether they should receive any satisfaction or not. Now, Courts of Equity treat such an exercise of power as wholly unjust and unconscientious; and therefore will interfere, not, indeed, to modify or absolutely to destroy the power, but to prevent it from being made an instrument of caprice, injustice, or imposition. Equity, in affording redress in such cases, does little more than apply the maxim, *Nemo ex alterius detrimento fieri debet locupletior.*[1]

§ 559. And this principle is by no means confined to the administration of assets; but it is applied to a vast variety of other cases (as we shall hereafter see); as for instance, to cases of two mortgages, where one covers two estates, and the other but one; to cases of extents by the Crown; and indeed, to cases of double securities generally. It may be laid down as the general rule of the Courts of Equity in cases of this sort, that, if a creditor has two funds, he shall take his satisfaction (if he may) out of that fund, upon which another creditor has no lien; and the like rule is ap-

[1] 2 Fonbl. Eq. B. 3, ch. 2, § 6, and note (*i*). See Mills *v.* Eden, 10 Mod. 499; Ante, § 327, 499; Post, § 633 to 642.

[2] 1 Madd. Ch. Pr. 202, 203; Lanoy *v.* Duke of Athol, 2 Atk. 446; Aldrich *v.* Cooper, 8 Ves. 382, 388; Cornwall, in re, 2 C. & L. 131; 3 Dru. & War. 173; Kempe *v.* Antill, 2 Bro. Ch. R. 11; Wright *v.* Simpson, 6 Ves. 714; 2 Fonbl. Eq. B. 3, ch. 2, § 6; Ante, § 327, 499; Post, § 633, 638, 642.

plied to other persons standing in a similar predicament.[1]

§ 560. But, although the rule is so general, yet it is not to be understood without some qualifications. It is never applied except where it can be done without injustice to the creditor, or other party in interest, having a title to the double fund, and also without injustice to the common debtor.[2] Nor is it applied in favor of persons who are not common creditors of the same common debtor, except upon some special Equity. Thus, a creditor of A. has no right, unless some peculiar Equity intervenes, to insist that a creditor of A. and B. shall proceed against B.'s estate alone for the satisfaction of this debt, so that he may thereby receive a greater dividend from A.'s estate.[3] So, where a creditor is a creditor upon two estates for the same debt, he will be entitled to receive dividends to the full amount from both estates, until he has been fully satisfied for his debt; for his title in such a case is not to be made to yield in favor of either estate, or the creditors of either to his own prejudice.[4] It has, indeed, been said by Lord Hardwicke, that Courts of Equity have no right to marshal the assets of a person who is

1 Lanoy *v.* Athol, 2 Atk. 446; Colchester *v.* Stamford, 2 Freem. R. 124; Lacam *v.* Mertins, 1 Ves. 312; Ex parte Kendall, 17 Ves. 514, 520; Aldrich *v.* Cooper, 8 Ves. 388, 395; Trimmer *v.* Bayne, 9 Ves. 210, 211; Rumbold *v.* Rumbold, 3 Ves. 64; Dorr *v.* Shaw, 4 Johns. Ch. R. 17; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 412; Greenwood *v.* Taylor, 1 Russell & Mylne, 185; Gwynne *v.* Edwards, 2 Russ. R. 289, n; Bute *v.* Cunninghame, 2 Russ. R. 275; Boazma *v.* Johnston, 3 Sim. R. 377; Ante, § 327, 499; Post, § 633, 638, 642.

2 See Earl of Clarendon *v.* Barham, 1 Younge & Coll. N. R. 688, 709.

3 Ex parte Kendall, 17 Ves. 514, 520; Post, § 642 to 645.

4 Bense *v.* Cox, 6 Beav. R. 84.

alive; but only the real and personal assets of a person deceased; for the assets are not subject to the jurisdiction of Equity until his death.[1] But this language is to be understood with reference to the case in which it was spoken; for there is no doubt, that there may be a marshalling of the real and personal assets of living persons under particular circumstances, where peculiar Equities attach upon the one, or the other; although such cases are very rare.[2]

§ 561. The rule of Courts of Equity, in marshalling assets in the course of administration is, that every claimant upon the assets of a deceased person shall be satisfied, as far as such assets can, by any arrangement consistent with the nature of their respective claims, be applied in satisfaction thereof.[3] The rule must necessarily in its application to the actual circumstances of different cases, admit, nay, must require, very different modifications of relief. It may be illustrated by the suggestion of a few cases, which present its application in a clear view, and show the limitations belonging to it.

§ 562. In the first place, if a specialty creditor, whose debt is a lien on the real estate, receive satisfaction out of the personal assets of the deceased, a simple contract creditor, (who has no claim except upon those personal assets,) shall in Equity stand in the place of the specialty creditor against the real assets, so far as

[1] Lacam *v.* Mertins, 1 Ves. 312.

[2] See Ex parte Kendall, 17 Ves. 514; Aldrich *v.* Cooper, 8 Ves. 388, 389, 394; Dorr *v.* Shaw, 4 Johns. Ch. R. 17; Sneed *v.* Lord Culpepper, 2 Eq. Abridg. 255, 260.

[3] See Clifton *v.* Burt, 1 P. Will. 679, Mr. Cox's valuable note, (1), from which I have freely drawn; 2 Fonbl. Eq. B. 3, ch. 2, § 6; Post, § 633, note.

the latter shall have exhausted the personal assets in payment of his debts, and no farther.[1] But the Court will not in cases of this sort, extend the relief to creditors farther than the nature of the contract will justify it. Therefore, it must be a specialty creditor of the person, whose assets are in question; such a one as might have a remedy against both the real and personal estate of the deceased debtor, or against either of them. For it is not every specialty creditor in whose place the simple contract creditors can come to affect the real assets. If the specialty creditor himself cannot affect the real estate, as, if the heirs are not bound by the specialty; or if there is no personal covenant binding the party to pay; or if the creditors are not creditors of the same person, and have not any demand against both funds, as being the property of the same person; in these and the like cases, there is no ground for the interposition of Courts of Equity.[2]

§ 563. On the other hand, if a specialty creditor, having a right to resort to two funds, has not as yet received satisfaction out of either, a Court of Equity will interfere, and either throw him for satisfaction upon the fund, which can be affected by him only, to the intent that the other fund shall be clear for him, who can have access to the latter only;[3] or it will put

[1] Anon. 2 Ch. Cas. 4; Sagittary *v.* Hyde, 1 Vern. 455; Neave *v.* Alderton, 1 Eq. Abridg. 144; Galton *v.* Hancock, 2 Atk. 436; Clifton *v.* Burt, 1 P. Will. 679, Cox's note (1); Cheeseborough *v.* Millard, 1 Johns. Ch. R. 413.

[2] Lacam *v.* Mertins, 1 Ves. 312, 313; Aldrich *v.* Cooper, 8 Ves. 388, 389, 390, 394; Ex parte Kendall, 17 Ves. 520.

[3] Sagittary *v.* Hyde, 1 Vern. 455; Lanoy *v.* Duke of Athol, 2 Atk. 446; Pollexfen *v.* Moore, 3 Atk. 272; Attorney-General *v.* Tyndall, Ambler, R. 615. See Sproule *v.* Pryor, 8 Sim. 189.

the creditor to his election between the one fund and the other. And, if the creditor resorts to the fund, upon which alone the other party has any security, it will decree satisfaction *pro tanto* to the latter out of the other fund.[1] The usual decree in such cases is, that "In case any of the specialty creditors shall exhaust any part of the personal estate, then the simple contract creditors are to stand in their place, and receive a satisfaction *pro tanto* out of" the real assets.[2]

§ 564. The same principle applies to the case of a mortgagee, who exhausts the personal estate in the payment of his debt. In such a case, the simple contract creditors will be allowed to stand in the place of the mortgagee, in regard to the real estate bound by the mortgage.[3] And, where the personal assets have been so applied in discharge of a mortgage, the simple contract creditors may, in furtherance of the same principle, compel the heir to refund so much of the personal assets as have been applied to pay off the mortgage.[4]

§ 564 *a*. It was formerly doubted whether the same principle applied to the case of a vendor of an estate, whose unpaid purchase-money was, after the death of the purchaser, paid out of his personal estate. But it is now settled that, in such a case, the simple contract creditors of the purchaser shall stand in the

[1] Aldrich *v.* Cooper, 8 Ves. 389, 394, 395; Trimmer *v.* Bayne, 9 Ves. 210, 211.

[2] Westfaling *v.* Westfaling, 3 Atk. 467; Davies *v.* Topp, 1 Bro. Ch. R. 526; Ante, § 557.

[3] Aldrich *v.* Cooper, 8 Ves. 388, 395, 396; Lutkins *v.* Leigh, Cas. Temp. Talb. 53; Wilson *v.* Fielding, 2 Vern. 763; Selby *v.* Selby, 4 Russ. 336, 341.

[4] Wilson *v.* Fielding, 2 Vern. 763.

place of the vendor, with respect to his lien on the estate so sold, against the devisee, as well as against the heir of the same estate. For the established rule being that simple contract creditors are, as against a devisee, to stand in the place of specialty creditors, who have exhausted the personal assets, because the specialty creditor had the two funds of real and personal estate to resort to; by analogy, the simple contract creditors ought to be entitled to stand in the place of the vendor against the devisees, because the vendor has equally a charge upon the double fund of real and personal estate. Indeed, if the charge or lien of the vendor is to be considered in the same manner as if it were secured by mortgage, or in the nature of a mortgage, (as it well may be,) the principle above stated would clearly apply in favor of the simple contract creditors.[1]

§ 565. In general, legatees are entitled to the same equities where the personal estate is exhausted by specialty creditors; for they would otherwise be without any means of receiving the bounty of the testator.[2] They are, therefore, permitted to stand in the place of the specialty creditors against the real assets descended to the heir.[3] So they are permitted, in like

[1] Selby *v.* Selby, 4 Russ. R. 336, 340, 341; Trimmer *v.* Bayne, 9 Ves. 209. But see Pollexfen *v.* Moore, 3 Atk. 272, which is said in Sproule *v.* Pryor, 8 Sim. R. 189, to be overruled. The same rule is now applied in favor of legatees. Sproule *v.* Pryor, 8 Sim. R. 189.

[2] Arnold *v.* Chapman, 1 Ves. 110; Mogg *v.* Hodges, 2 Ves. 51; Aldrich *v.* Cooper, 8 Ves. 396; Lomas *v.* Wright, 2 Mylne & Keen, 769, 775.

[3] Herne *v.* Meyrick, 1 P. Will. 201, 202; Culpepper *v.* Aston, 2 Ch. Cas. 117; Bowaman *v.* Reeve, Prec. Ch. 578; Tipping *v.* Tipping, 1 P. Will. 729, 730; Clifton *v.* Burt, 1 P. Will. 679, Cox's note; Fenhoulhet

manner to stand in the place of a mortgagee, who has exhausted the personal estate in paying this mortgage.[1] And their Equity will prevail, not only in case where the mortgaged premises have descended to the heir at law; but also where they have been devised to a devisee, who is to take, subject to the mortgage.[2] But their Equity will not generally prevail against a devisee of the real estate not mortgaged, whether he be a specific or a residuary devisee; for he also takes by the bounty of the testator; and between persons, equally taking by the bounty of the testator, Equity will not interfere, unless the testator has clearly shown some ground of preference or priority of the one over the other.[3] So that there is a distinction between the case where the estate is devised, and there are specialty creditors, and the case where it is devised, and there is a mortgage on it. In the latter case, the legatees stand in the place of the mortgagee, if he exhausts the personal assets; in the former case, they do not stand in the place of the specialty creditors.

v. Passavant, 1 Dick. R. 253; Pollexfen *v.* Moore, 3 Atk. 272; Wythe *v.* Henniker, 2 Mylne & Keen, 645, 646; Selby *v.* Selby, 4 Russ. 336, 341; Lomas *v.* Wright, 2 Mylne & Keen, 769. But see Young *v.* Hassard, 1 Jones & L. R. 466; Tombs *v.* Roch, 2 Collyer, R. 490; Gervis *v.* Gervis, 14 Sim. 654.

[1] Lutkins *v.* Leigh, Cas. Temp. Talb. 53; Forrester *v.* Leigh, Ambl. R. 171; Selby *v.* Selby, 4 Russ. R. 336, 341; Sproule *v.* Pryor, 8 Sim. R. 189.

[2] Lutkins *v.* Leigh, Cas. Temp. Talb. 53, 54; Forrester *v.* Leigh, Ambl. R. 171; Norris *v.* Norris, 2 Dick. 542; Wythe *v.* Henniker, 2 Mylne & Keen, 644; Selby *v.* Selby, 4 Russ. 336, 340, 341.

[3] Clifton *v.* Burt, 1 P. Will. 679, 680, and Cox's note; Haslewood *v.* Pope, 3 P. Will. 322, 324; Scott *v.* Scott, Ambl. R. 383; S. C. 1 Eden, R. 458; Forrester *v.* Leigh, Ambler, 171; Aldrich *v.* Cooper, 8 Ves. 396, 397. Such preference or priority may be shown in various ways. Thus, if real estate is devised for, or subject to the payment of debts, if

The reason assigned is, that a specialty debt is no lien on land in the hands of the obligor, or his heir, or devisee. But a mortgage is a lien, and an estate in the land. By a devise of land mortgaged, nothing passes but the equity of redemption, if it is a mortgage in fee; if it is for years, the reversion and equity of redemption pass.[1]

§ 566. In like manner, where lands are subjected to the payment of all debts, legatees are permitted to stand in regard to such lands, in the place of simple contract creditors, who have come upon the personal estate, and exhausted it so far as to prevent a satisfaction of their legacies.[2] So, where legacies given by a

the personal estate is exhausted in payment of debts, the legatees will stand in the place of creditors on the real assets. 2 Fonbl. Eq. B. 3, ch. 2, § 7, note (*k*); Foster v. Cook, 3 Bro. Ch. R. 347; Haslewood v. Pope, 3 P. Will. 323; Aldrich v. Cooper, 8 Ves. 396, 397. Such preference or priority may also be rebutted by circumstances. Thus, it has been said that there is no rule, that where real and personal estate is charged with the payment of debts, and the residue is given to a legatee or children, the Court would in such case turn the charge on the real estate, to give the whole personal estate to the legatee. Arnold v. Chapman, 1 Ves. 110. See also Wythe v. Henniker, 2 Mylne & Keen, 635, 644, 645; Lomas v. Wright, 2 Mylne & Keen, 769. In this last case, it was held that creditors by specialty, who are mere volunteers, are not entitled to compete with creditors on simple contract for a valuable consideration. But, as against the devisees, they have a right to stand in the place of the mortgagees, who have exhausted the fund provided by the testator for the payment of debts.

[1] Forrester v. Leigh, Ambl. R. 171, 174. See also Lutkins v. Leigh, Cas. Temp. Talb. 53; 2 Fonbl. Eq. B. 3, ch. 2, § 7, and note (*k*); Aldrich v. Cooper, 8 Ves. 396, 397. This distinction between the heir and the devisee, makes it very important, in many cases, to ascertain whether under a will an heir takes by descent or by purchase. See Herne v. Meyrick, 1 P. Will. 201; Scott v. Scott, 1 Eden, R. 458; S. C. Ambl. R. 383; Clifton v. Burt, 1 P. Will. 678, 679, Cox's note (1).

[2] Clifton v. Burt, 1 P. Will. 678, 679, and Cox's note; Haselwood v. Pope, 3 P. Will. 323.

will are charged on real estate, but legacies by a codicil are not; the former legatees will be compelled to resort to the real assets if there is a deficiency of the personal assets to satisfy both.[1]

§ 566 *a*. Upon analogous grounds, if a specific legacy is pledged by the testator, the specific legatee is entitled to have his specific legacy redeemed; and if the executor fail to perform that duty, the specific legatee is entitled to compensation, to the amount of the legacy, out of the general assets of the testator. So if a specific legacy is incumbered with a mortgage or other charge, the specific legatee is entitled to have it paid off by the executor out of the general assets of the testator; and if that be not done, he is entitled to stand in the same situation as if the duty of the executor had been faithfully performed. Indeed, the same principle applies to specific legatees as to devisees, in respect to the redemption of the subject-matter of the gift out of the general assets of the testator.[2]

§ 567. The doctrine adopted in all these cases, of allowing one creditor to stand in the place of another, having two funds to resort to, and electing to take satisfaction out of one, to which alone another creditor can resort, was probably transferred from the Civil Law into Equity Jurisprudence. It is certainly founded in principles of natural justice; and it early worked its way, under the title of substitution, into the Civil Law, where it was applied in a very large and liberal man-

[1] Hyde *v.* Hyde, 3 Ch. Rep. 155; Masters *v.* Masters, 1 P. Will. 422; Bligh *v.* Earl of Darnley, 2 P. Will. 620; Clifton *v.* Burt, 1 P. Will. 679 Cox's note; Norman *v.* Morrill, 4 Ves. 769.

[2] Knight *v.* Davis, 3 Mylne & K. 358, 361.

ner. But upon this subject we shall have occasion to speak hereafter in another place.[1]

§ 568. There are other cases in which the marshalling of assets is in like manner enforced in Courts of Equity; as, for instance, in favor of the widow of a person deceased. After the death of the husband, his creditors cannot take his widow's necessary apparel in satisfaction of their debts.[2] With this exception, a widow's paraphernalia are generally subject to the payment of the debts of her husband.[3] But, in favor of the widow, and to preserve her paraphernalia, Courts of Equity will interfere, by turning creditors, entitled to proceed against real assets or funds, over to these assets and funds for satisfaction. And if the paraphernalia have been actually taken by creditors in satisfaction of their debts, the widow will be allowed to stand in their place, and the assets will be marshalled so as to give her a compensation *pro tanto*.[4]

§ 569. In speaking of the marshalling of assets in cases of legacies, whether specific or residuary, (when the latter are entitled to the benefit,) it must be understood that the legacies are to private persons, taking for their own benefit, and not legacies for charity, either directly or through the instrumentality of a trustee or legatee. In general, legacies of personal property to

[1] See Cheeseborough *v.* Millard, 1 Johns. Ch. R. 412, 413, and Ante, § 494, on the subject of contribution between sureties. Post, § 635, 636, 637.

[2] 2 Black. Comm. 436; Noy's Maxims, ch. 49; Townshend *v.* Windham, 2 Ves. 7.

[3] Ram on Assets, ch. 10, § 1; 2 Black. Comm. 436; Toller on Executors, B. 3, ch. 8, p. 421, 422, 423.

[4] Ram on Assets, ch. 18, p. 353, 354, and the cases there cited; Aldrich *v.* Cooper, 8 Ves. 397; Incledon *v.* Northcote, 3 Atk. R. 438.

charitable uses, are valid in point of law. But, since the Statute of 9th George II., ch. 36, in England, legacies or bequests by will to charitable uses, payable out of real estate, or charged on real estate, or to arise from the sale of real estate, are utterly void. And Courts of Equity, following out the intent and object of the Statute, have refused to interfere in favor of legatees of personal property for charity, by marshalling assets for this purpose in any case whatever; as, by throwing the debts or legacies on real assets for payment; or, by allowing the charity legatees to stand in the place of any creditor or legatee, who has exhausted the personal estate, against the real assets.[1]

§ 570. Hitherto we have been speaking of marshalling assets in favor of creditors, legatees, or widows. But it is not to be understood that these are the only persons entitled to the benefit of this wholesome doctrine of Courts of Equity. Heirs at law and devisees are, in a great variety of cases, entitled to the protection of it. Thus, for instance, if an heir or devisee of real estate is sued by a bond creditor, he may, in many cases, be entitled to stand in the place of such specialty creditor against the personal estate of the deceased testator or intestate.[2]

§ 571. In order more fully to comprehend the nature and limitations of this doctrine, it is necessary to

[1] Ram on Assets, ch. 18, § 3, p. 346 to 353; Mogg *v.* Hodges, 2 Ves. 52; Attorney-General *v.* Tyndall, Ambl. R. 614; S. C. 2 Eden, R. 207; Clifton *v.* Burt, 1 P. Will. 670, Cox's note; Ridges *v.* Morrison, 1 Cox, R. 189; Toller on Executors, B. 3, ch. 8, p. 423; Attorney-General *v.* Winchelsea, 3 Bro. Ch. R. 380, and Belt's note (3); Attorney-General *v.* Hurst, 2 Cox, R. 364; Post, 2 Eq. Jurisp. § 1180.

[2] Mogg *v.* Hodges, 2 Ves. 52; Galton *v.* Hancock, 2 Atk. 424, 425.

state, that in the view of Courts of Equity, the personal estate of the deceased constitutes the primary and natural fund for the payment of his debts; and they will direct it to be applied in the first instance to that purpose, unless, from the will of the deceased or from some other controlling equities, it is clear that it ought not to be so applied.[1] But, in the order of satisfaction out of the personal estate of the deceased, if it is not sufficient for all purposes, creditors are preferred to legatees; specific legatees are preferred to the heir and devisee of the real estate, charged with specialties, or with the payment of debts;[2] and specific legacies are liable to be applied in payment of specialty debts in priority to real estate devised;[3] the devisee of mortgaged premises is preferred to the heir at law of descended estates;[4] and *à fortiori*, the devisee of premises not mortgaged is preferred to the heir at law.[5] In case unincumbered lands and mortgaged lands are both specifically devised, but expressly after the payment of all debts, they are to contribute proportionally

[1] See Co. Litt. 208 *b*, Butler's note, 106.

[2] 2 Fonbl. Eq. B. 3, ch. 2, § 3, 4, 5, and notes (*e*), (*f*), (*g*), (*h*); Cope *v.* Cope, 2 Salk. 449.

[3] Cornwall *v.* Cornwall, 12 Sim. 298. [But see Tombs *v.* Roch, 2 Collyer, R. 490, where it was held that the amount necessary to complete the payment of the specialty debts must be contributed ratably by the specific legatees and devisees. See also Gervis *v.* Gervis, 14 Sim. 654, where Cornwall *v.* Cornwall, was overruled.]

[4] Toller on Executors, B. 3, ch. 8, p. 418; Howell *v.* Price, 1 P. Will. 294. Mr. Cox's note; Cope *v.* Cope, 2 Salk. 449, Mr. Evans's note. Lord Hardwicke at first decided otherwise in Galton *v.* Hancock, 2 Atk. 421, but afterwards altered his opinion; Id. 2 Atk. 430.

[5] Chaplin *v.* Chaplin, 3 P. Will. 364; Davies *v.* Topp, 1 Bro. Ch. R. 524; Manning *v.* Spooner, 3 Ves. 114; Livingston *v.* Newkirk, 3 Johns. Ch. R. 319; 2 Fonbl. Eq. B. 3, ch. 2, § 3, 4, 5, and notes.

in discharge of the mortgage.[1] Where the equities of the legatees and devisees are equal, which (as we have seen) is sometimes the case, Courts of Equity remain neutral, and silently suffer the law to prevail.[2] But, where the personal assets are sufficient to pay all the debts and legacies and other charges, there the heir or devisee, who has been compelled to pay any debt or incumbrance of his ancestor or testator, binding upon him, is entitled (unless there be some other Equity, which repels the claim) to have the debt paid out of the personal assets, in preference to the residuary legatees or distributees. Thus, for instance, if a specialty debt or mortgage of an ancestor or testator is paid by the heir or devisee, he is entitled to have it paid out of the personal assets in the hands of the executor, unless the testator, by express words or other manifest intention, has clearly exempted the personal assets from the payment.[3] And the personal assets are liable, in such cases of mortgage, even although there may not be any personal covenant for the payment of the debt or collateral bond.[4] And lands, subject to, or devised for

[1] Carter *v.* Barnardiston, 2 P. Will. 505; 2 Bro. Par. Cas. 1; Howell *v.* Price, 1 P. Will. 294, Cox's note.

[2] The whole subject was largely discussed in Davies *v.* Topp, 1 Bro. Ch. R. 524, Appx.; Donne *v.* Lewis, 2 Bro. Ch. R. 257; Manning *v.* Spooner, 3 Ves. 114; Galton *v.* Hancock, 2 Atk. 424, 430; Harwood *v.* Oglander, 8 Ves. 106, 124; Milnes *v.* Slater, 8 Ves. 294, 303; and in Mr. Cox's note to Howell *v.* Price, 1 P. Will. 294; and Evelyn *v.* Evelyn, 2 P. Will. 664; Bootle *v.* Blundell, 1 Meriv. R. 215 to 238; Ram on Assets, ch. 28, § 1 to 4, ch. 29, § 1 to 4. See the Reporter's note to Phillips *v.* Parker, 1 Tamlyn, R. 136, 143.

[3] 2 Fonbl. Eq. B. 3, ch. 2, § 1, and note (*a*); 1 Madd. Ch. Pr. 474, 475; Toller on Executors, B. 3, ch. 8, p. 418; Howell *v.* Price, 1 P. Will. 291, 294, and Cox's note (1); Cope *v.* Cope, 2 Salk. 449; Ancaster *v.* Mayor, 1 Bro. Ch. R. 454.

[4] Ibid.

the payment of debts, are in like manner, liable to discharge such mortgage in favor of the heir or devisee, to whom the mortgaged lands may belong.[1]

§ 572. What shall constitute proof of such an intended exemption by the testator, is not, in many cases, ascertainable upon abstract principles; but must depend upon circumstances. It is certain, however, that a devise of all the testator's real estate, subject to the payment of his debts, or a devise of a particular estate, subject to the payment of debts, will not alone be sufficient to exempt the personal estate.[2] But, on the other hand, if the real estate be directed to be sold for the payment of debts, and the personal estate is expressly bequeathed to legatees, there the personal estate will, by necessary implication, be exempted.[3]

§ 573. The doctrine of the Court, in all cases of this sort, is founded upon the same principle, that is, to follow out the intention of the testator. The personal estate is deemed the natural and primary fund for the payment of all debts; and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention. The

[1] Bartholomew *v.* May, 1 Atk. 487; Tweedale *v.* Coventry, 1 Bro. Ch. R. 240; Howell *v.* Price, 1 P. Will. 294, Cox's note; Serle *v.* St. Eloy, 2 P. Will. 386.

[2] Ibid.; Bridgman *v.* Dove, 3 Atk. 201, 202; Haslewood *v.* Pope, 3 P. Will. 325; Inchiquin *v.* French, Ambl. R. 33; S. C. 1 Cox, R. 1; 1 Wils. R. 82; 1 Bro. Ch. R. 458; Lupton *v.* Lupton, 2 Johns. Ch. R. 628; Livingston *v.* Newkirk, 3 Johns. Ch. R. 319; Walker *v.* Jackson, 2 Atk. 625; Ancaster *v.* Mayor, 1 Bro. Ch. R. 451; Bootle *v.* Blundell, 1 Meriv. R. 194, 210.

[3] 2 Fonbl. Eq. B. 3, ch. 2, § 1, and note (*a*); Id. § 3, and note (*e*), (*a*); Wainwright *v.* Bendlowes, 2 Vern. 718; S. C. Prec. Ch. 451; Bamfield *v.* Wyndham, Prec. Ch. 101; Walker *v.* Jackson, 2 Atk. 624, 625; Gray *v.* Minnethorp, 3 Ves. 103; Bootle *v.* Blundell, 1 Meriv. R. 194, 210, 224; Milnes *v.* Slater, 8 Ves. 293, 303.

general rule, therefore, of Courts of Equity, although sometimes delivered in one form, and sometimes in another, is, (as Lord Hardwicke has expressed it,) that the personal estate shall be first applied to the payment of debts, unless there be express words, or a plain intention of the testator, to exempt his personal estate, or to give his personal estate as a *specific* legacy; for he may do this, as well as give the bulk of his real estate by way of specific legacy.[1]

§ 574. But, although the personal estate is thus deemed the general and primary fund for the payment of debts, and still remains so, notwithstanding the real estate is also collaterally chargeable, yet the rule is otherwise, or rather is differently applied, where the charge of the debt is principally and primarily upon the real estate, and the personal security or covenant is only collateral; for the primary fund ought in conscience, in all cases, to exonerate the auxiliary fund.[2] The debt or incumbrance may be in its nature real, or it may become so by the act of the person who has the power of charging both the real and the personal funds; or the land, although it be auxiliary only to the personal estate of the original contractor of the debt or incumbrance, may yet become the primary fund, as between itself and the personal estate of another person, who may take the land, either by descent or purchase, subject to the charge. In both these cases the personal estate is charged (if at all) only as a security for the land; and it ought to have the same measure

[1] Walker *v.* Jackson, 2 Atk. 625.

[2] See Co. Litt. 208 *b*, Butler's note, 106; Lechmere *v.* Charlton, 15 Ves. 197, 198.

of Equity as the land is entitled to, when it is pledged as a security for a personal debt.[1]

§ 575. The first class of cases may be illustrated by the case of a jointure or portion, to be raised out of lands by the execution of a power. In such a case, notwithstanding there may be a personal covenant or agreement to raise the jointure or portion to the stipulated amount; yet the charge, when raised, is to be deemed a primary charge on the lands, and the personal estate of the covenantor only security therefor. In other words, although the covenantor is the original contractor, yet the charge, being in its nature real, and the covenant only an additional security, the land will be decreed to bear the burden, in exoneration of the personal estate.[2] The same principle will apply to pecuniary portions, to be raised in favor of daughters, in a marriage settlement, out of lands placed in the hands of trustees for this purpose, although there be a personal covenant, also, of the settler to have the portion thus raised.[3]

§ 576. The second class of cases may be illustrated by the common case of a mortgage created by an

[1] See Earl of Clarendon *v.* Barham, 1 Younge & Coll. N. R. 688, 711, 712, where Scott *v.* Beecher, 5 Madd. R. 96, and Lord Ilchester *v.* Carnarvon, 1 Beav. R. 209, are remarked on. I borrow this language and the cases which illustrate it, from the valuable note of Mr. Cox to Evelyn *v.* Evelyn, 5 P. Will. 664, note (1). See also Mr. Cox's note to Howell *v.* Price, 1 P. Will. 294, note (1).

[2] Coventry *v.* Coventry, 9 Mod. 13; S. C. 2 P. Will. 222; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (*b*).

[3] Edwards *v.* Freeman, 2 P. Will. 435; Evelyn *v.* Evelyn, 2 P. Will. 664, Mr. Cox's note (1); Ward *v.* Dudley & Ward, 2 Bro. Ch. R. 316; S. C. 1 Cox, R. 438; Wilson *v.* Darlington, 1 Cox, R. 172; Duke of Ancaster *v.* Mayor, 1 Bro. Ch. R. 454, 464, and Belt's note (2); Bassett *v.* Percival, 1 Cox, R. 268; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note (*b*). See Lechmere *v.* Charlton, 15 Ves. 197, 198.

ancestor, and the mortgaged estate descending upon his heir. There, although the heir should become personally bound to pay the mortgage, yet his personal estate would not be liable to be charged in favor of any person who should derive title by descent under him to the mortgaged premises, subject to the mortgage. For the debt was not originally contracted by him; and it was, as to him, primarily chargeable on the land; and even his covenant to pay the mortgage would only be considered as a security for the debt.[1]

[1] Cope *v.* Cope, 2 Salk. 449; Evelyn *v.* Evelyn, 2 P. Will. 661, and Mr. Cox's note (1), and also his note (1) to Howell *v.* Price, 1 P. Will. 294; Leman *v.* Newnham, 1 Ves. 51; Lacam *v.* Mertins, 1 Ves. 312; Ancaster *v.* Mayor, 1 Bro. Ch. R. 455, 464, and Belt's note (2); Lawson *v.* Hudson, 1 Bro. Ch. R. 58, and Mr. Belt's note. Earl of Clarendon *v.* Barham, 1 Younge & Coll. N. R. 688, 711, 712. In this case Mr. Vice-Chancellor Bruce said: "I have, I think, only further to consider whether the Island estate as it now stands is the prior or the secondary fund for the payment of the Island mortgage debt. To the discharge of an ordinary debt due from Mr. Joseph Foster Barham, his personal estate ought, I apprehend, in the ordinary course, to be first applied. It has been contended, however, by the plaintiffs, that with regard to the sum secured on the Island estate, this cannot be, and that to the payment of that sum the Island estate must primarily be applied. The first reason assigned for this is, that there is evidence in the cause showing (as the plaintiffs insist) that, in point of fact, Mr. John Barham intended that, as between the personalty and the mortgaged realty liable to this debt, the latter should be the prior fund to be applied. I am unable, however, to discover any such evidence. It is true, that in my opinion there was an absence of intention on his part, that any part of the capital of his mother's fortune should be considered as either satisfied or extinguished. But this does not appear to me to amount to any thing for the present purpose. He could not as to the other persons interested in Lady Caroline's fortune, without their consent, (a consent neither asked nor obtained, nor probably thought of,) relieve any portion of his father's assets from the liability under which the whole of those assets was to make good that fortune, and I do not see any ground whatever for saying that he ever in fact indicated any wish or design, that any one part should wholly or partially indemnify any other part of the assets in respect of it. The other assigned reason is, that, independently of any proof of actual inten-

Therefore, where land descended to the wife, subject to a mortgage made by her father, and, on an assign-

tion, the united characters of acting executor and sole residuary legatee, as well as heir and devisee of his father, having rendered Mr. John Barham solely and equally interested in the whole of the funds from which the fortune was due, it is a necessary consequence that the portion of those funds specifically pledged, though not exclusively liable for its payment, must bear the burden of the pledge without indemnity or contribution. The necessity of such a consequence is not obvious to my apprehension. The general rule is, that a pledge or security for a debt, though having its full operation in favor of the creditor, does not take away the character of debt, and neither excludes him from any other remedy, nor changes or affects the mode in which as between those who take the debtor's property, subject to his debts, that property is to be applied. Generally, with regard to such a question, the case is dealt with as if the pledge or security did not exist. I do not forget the distinctions or exceptions established or recognized in Lutkins *v.* Leigh, (Ca. temp. Talb. 53,) Halliwell *v.* Tanner, (1 Russ. & M. 633,) Wythe *v.* Henniker, (2 Myl. & C, 635,) and the authorities to which reference is there made, distinctions or exceptions proving the rule, but otherwise seeming to me to have no place in the present case. If the mere fact of the union of interests were material, it would have had its operation and effect, though Mr. John Barham had died within an hour of his father's death ignorant of it. In that case there might have arisen, and as matters are, there may arise, an absolute necessity for deciding which is the first fund for paying an unsecured specialty debt due from Mr. Joseph Foster Barham. Suppose such a creditor in existence; it would be contrary to all principle to hold that his caprice or election should decide between real estate now belonging to one person, and personal estate now belonging to another, which of the two is finally to bear the burden. The Court must decide in such a case. And on what ground could it be held, that the personal estate ought not, as between that and the real estate, to be first applied? What could have taken place in the event that I have supposed — what has, in fact, taken place, to change the ordinary course as to such an unsecured debt? In my opinion nothing. If so, in the absence of proof of actual intention, why should the mortgage or pledge make any difference? Yet, if the plaintiffs' contention is right, they would in the event of the mortgagee's recovering, as it is admitted that they are entitled to recover their debt against the general personal estate of Joseph Foster Barham, be entitled to stand in the mortgagee's place against, or be indemnified by the Island estate. The foundation of such a state of things in principle I am unable to see. Agreeing entirely with the doctrine laid down in Bagot *v.* Oughton, (1 P. W. 347,) and Evelyn *v.*

ment of the mortgage, the husband covenanted to pay the money to the assignee; it was decreed that the

Evelyn, (2 P. W. 659,) which has been recognized in many other cases,' (particularly one in this family, Barham *v.* Lord Thanet, 3 M. & K. 607,) I do not see any clear and irresistible reason for not holding that an executor, who being also sole residuary legatee, has received more personal estate than enough to pay all the funeral and testamentary expenses, and debts and liabilities of every description, as well as legacies, becomes himself substantially debtor to the creditors of the testator. And whether such an executor is sole executor or survived by a co-executor, I apprehend that the doctrine of Lord Chief Baron Gilbert, Lex Præt. 315, equally applies in principle. The case also of Lord Belvedere *v.* Rochfort, (5 Bro. P. C. 299,) in the House of Lords, (though I am aware of what Lord Thurlow has in Tweddell *v.* Tweddell, (2 Bro. C. C. 101,) and Lord Alvanley in Woods *v.* Huntingford, (3 Ves. 130,) said of that case,) may be thought to have at least a considerable bearing the same way, and consequently against the plaintiffs. Lord Thurlow, who, as leading counsel, signed the case for the successful party, the respondent in Lord Belvidere *v.* Rochfort, appears to have considered that the House of Lords *held, but ought not to have held, that the mortgage debt in question there* had been made the debt of Robert Rochfort, the grandfather, as between his real and his personal estate; and he is reported to have said, 'In that case George had a fee-simple in the estate; he was capable of giving it after the charges were extinguished.' But I am not at all persuaded that he dissented from the doctrine to be found in Gilbert, and upon which doctrine the printed cases in Lord Belvidere *v.* Rochfort, and the statements of Lord Thurlow and Lord Alvanley, in Tweddell *v.* Tweddell, and Woods *v.* Huntingford, show, if not the certainty, at least a very high degree of probability, that in Lord Belvidere's case, both Lord Lifford and the House of Lords meant to act and did act independently of Lord Jocelyn's decree, and not by reason or in consequence of what Lord Jocelyn had done. Nor can I see that Perkyns *v.* Bayntun (2 P. W. 664, n.) as to which I have examined the Registrar's book, is at variance with this doctrine. In Perkyns *v.* Bayntun, no account was sought of the personal estate of Sir William Osbaldistone, who had died a quarter of a century before the suit. What was its amount, whether it was considerable or inconsiderable, whether as to his personal estate in fact he died solvent or insolvent, was not stated, and does not appear. The point in Gilbert seems not to have been raised or touched in that case. Upon the whole, thinking the opinion of Lord Chief Baron Gilbert well founded in principle, and corroborated, if touched, by Lord Belvidere's case, I should, had the cases of Scott *v.* Beecher, (5 Madd. 96,) Evans *v.* Smithson, (not reported,) and Lord Ilchester *v.* Lord Carnarvon, (1 Beav. 269,) not existed,

husband's personal estate should not exonerate the mortgaged premises; for the debt was originally the father's; and the husband's covenant was only collateral security therefor.[1] So, where a mortgaged estate is purchased by an ancestor, subject to the mortgage, and of course so much less is paid for it, as the mortgage amounts to; there, upon a descent cast, if it be a fee, or upon devolution upon executors or legatees, if it be a leasehold estate, the personal estate of the

have held and decided that the personal estate of Joseph Foster Barham, and therefore in substance the personal estate of John Barham, is the first fund for the payment of the mortgage on the Island estate. Consistently, however, with the opinions which appear to have been expressed judicially by Sir John Leach, Lord Lyndhurst, and Lord Langdale, in these three cases, I apprehend that I cannot so decide. Feeling the respect due from me to these authorities, independently of Lord Lyndhurst's present position, deferring to them, and not upon this point acting in accordance with my own opinion, I direct the insertion in the decree of a declaration, that the Island estate is the first fund for the payment of the Island mortgage. The property which I have called the Island estate, subjected to this mortgage for 10,773*l.* 6*s.* 2*d.*, may possibly not be wholly real estate. It may include some personalty — a remark which I do not mean as extending to the Island compensation-money, which, as I have said, I cannot hold to have been or to be ascribed, or applied, or applicable, otherwise than merely as part of the general mass of the general assets of Joseph Foster Barham, or general personal estate of John Barham, this being, as it seems to me, a consequence of the manner in which, and expressed title under which, he received it, and of his conduct in all respects. His father had nothing more than a life-interest in the benefit of the Island mortgage. Before concluding I may observe, that the reference which I have made to Evans *v.* Smithson, has been occasioned by my entire reliance upon the authenticity of the information from which Mr. Tinney's statement of that case was made, and my supposition that Lord Lyndhurst's view of the law as to a vendor's lien, agreed with that of Sir W. Grant, in Trimmer *v.* Bayne (9 Ves. 209), and of Sir L. Shadwell in Sproule *v.* Prior, (8 Sim. 189). It seems that the passage in Gilbert was brought under his Lordship's notice, but not Lord Belvedere's case, and that neither was cited before Sir J. Leach or the present Master of the Rolls."

[1] Ibid.; Bagot *v.* Oughton, 1 P. Will. 347; See Gooch *v.* Gooch, 8 Eng. Law & Eq. R. 141.

purchaser will not be held bound to exonerate the mortgaged premises from the mortgage; for it is not the personal debt of the purchaser.[1]

§ 577. These illustrations may suffice to explain some of the more important doctrines of Courts of Equity upon this complicated subject of the marshalling of assets, (for, in a work like the present, it is impossible to examine all of them minutely,)[2] and to show upon what nice presumptions and curious analogies they sometimes proceed, some of which (to say the least of them) are sufficiently artificial, and elaborate, and subtile. The manner in which assets are now generally marshalled in the payment of debts, may be arranged in the following order. First, the general personal estate is applied to the payment of debts, unless exempted expressly, or by plain implication. Secondly, any estate particularly devised for the payment of debts, and only for that purpose. Thirdly, estates descended to the heir. Fourthly, estates specifically devised to particular devisees, although charged with the payment of debts.[3]

[1] Ancaster *v.* Mayor, 1 Bro. Ch. R. 454, and Mr. Belt's note (2). Tweddell *v.* Tweddell, 2 Bro. Ch. R. 101, and Mr. Belt's note; Butler *v.* Butler, 5 Ves. 534, 538; Cumberland *v.* Codrington, 3 Johns. Ch. R. 229; Mr. Cox's note to Howell *v.* Price, 1 P. Will. 294, and his note to Evelyn *v.* Evelyn, 2 P. Will. 664; 2 Fonbl. Eq. B. 3, ch. 2, § 2, note ( ); 4 Kent, Comm. Lect. 65, p. 420, 421, (4th edition.)

[2] See other cases, 2 Fonbl. Eq. B. 3, ch. 2, § 1, 2, 3, and notes; Harwood *v.* Oglander, 8 Ves. 106, 124; Milnes *v.* Slater, 8 Ves. 293, 303.

[3] Davies *v.* Topp, 1 Bro. Ch. R. 526; Donne *v.* Lewis, 2 Bro. Ch. R. 263; Harwood *v.* Oglander, 8 Ves. 106, 124; Milnes *v.* Slater, 8 Ves. 293, 303; Livingston *v.* Newkirk, 3 Johns. Ch. R. 319; 4 Kent, Comm. Lect. 65, p. 420, 421 (4th edit.); 1 Madd. Ch. Pr. 474; Ram on Assets, ch. 30, p. 374; Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 524, 537 to 543.

§ 578. This review of the jurisdiction of Courts of Equity over the administration of assets, however imperfect and brief, is quite sufficient to establish the truth of the remarks already stated, that the jurisdiction is not wholly and solely dependent upon the mere fact, that there exists a constructive trust of the funds in the hands of the personal representative, requiring them to be properly applied and distributed. But there are other and numerous sources of jurisdiction collaterally connected with it, such as the necessity of a discovery, and taking accounts and cross Equities by substitution and otherwise, existing, in a great variety of cases, in very complicated forms, all of which are, or may be, necessary to be examined, in order to a full and due administration of the estate. Indeed, the whole topic of marshalling assets seems properly to belong rather to the peculiar doctrines of Courts of Equity in regard to conflicting rights and equities, than to any notion of trust in the parties.

§ 579. Before quitting this subject, it may be useful to take notice of the interposition of Courts of Equity, in regard to the administration of assets, in cases where there is any alienation or waste of them on the part of the personal representative of the deceased. At Common Law, the executor or administrator is treated, for many purposes, as the owner of the assets, and has a power to dispose of and aliene them.[1] There is no such thing known, as the assets in the hands of an executor being the debtor, or as a creditor's having a lien on them; but the person of the executor, in respect to the assets which he has in his

[1] Hill *v.* Simpson, 7 Ves. 166; McLeod *v.* Drummond, 14 Ves. 353; S. C. 17 Ves. 154, 168.

hands, is treated as the debtor.[1] At law, the assets of the testator may, perhaps, at least under special circumstances, be taken in execution for the personal debt of the executor, unless, indeed, there be some fraud or collusion between the execution creditor and the executor;[2] as they certainly may also be taken in execution for the debts of the testator.[3] But in Courts of Equity, the assets are treated as the debtor, or, in other words, as a trust fund, to be administered by the executor for the benefit of all persons who are interested in it, whether they are creditors, or legatees, or distributees, or otherwise interested, according to their relative priorities, privileges, and equities.[4]

§ 580. Still, however, Courts of Equity do not supersede the principles of law upon the same subject. And, therefore, a sale made *bonâ fide* by the executor, for a valuable consideration, even with notice of there being assets, will be held valid, so that they cannot be followed by creditors or others, into the hands of the purchaser.[5] In this respect there is a manifest difference between the case of an ordinary trust, where notice takes away the protection of a *bonâ fide* purchase from the party,

[1] Farr *v.* Newnham, 4 T. Rep. 621, 634; Whale *v.* Booth, 4 T. R. 625, note; S. C. 4 Doug. R. 36; Nugent *v.* Gifford, 1 West, Rep. 496, 497; S. C. 1 Atk. 463; S. C. 2 Ves. 269. But see Hill *v.* Simpson, 7 Ves. 152; McLeod *v.* Drummond, 14 Ves. 361; S. C. 17 Ves. 154, 168.

[2] Whale *v.* Booth, 4 T. R. 623, note; S. C. 4 Doug. R. 36; Farr *v.* Newnham, 4 T. R. 621; McLeod *v.* Drummond, 17 Ves. 154; Ray *v.* Ray, Cooper, R. 264.

[3] Ibid.; Contra, McLeod *v.* Drummond, 17 Ves. 154, 168.

[4] Farr *v.* Newnham, 4 T. R. 636, per Buller, J.; Whale *v.* Booth, 4 T. R. 625, note; S. C. 4 Doug. R. 36.

[5] Ibid.; McLeod *v.* Drummond, 17 Ves. 154, 155, 168; Keane *v.* Roberts, 4 Madd. 357.

and this peculiar sort of trust, mixed up in some measure with general ownership.[1] To affect a sale or other transaction of an executor, attempting to bind the assets, so as to let in the claim of creditors and others, who are principally interested, there must be some fraud, or collusion, or misconduct, between the parties.[2] A mere secret intention of the executor to misapply the funds, unknown to the other party dealing with him, or a subsequent unconnected misapplication of them, will not affect the purchaser. He must be conusant of such intention, and designedly aid or assist in its execution.[3] But, in the view of Courts of Equity, there is a broad distinction between cases of a sale or pledge of the testator's assets for a present advance, and cases of such a sale or pledge for an antecedent debt of the executor;[4] for, in the latter case, the parties must be generally understood to coöperate in a misapplication of the assets from their proper purpose, unless that inference is repelled by the circumstances.[5]

§ 581. The general doctrine, now maintained by Courts of Equity, upon this subject, cannot be better summed up than it is by a learned Judge (Sir John Leach) in an important case.[6] "Every person," (said

[1] Mead *v.* Lord Orrery, Atk. 238, 239, 240.

[2] Hill *v.* Simpson, 7 Ves. 152; Nugent *v.* Gifford, 1 Atk. 463, cited 4 Bro. Ch. R. 136, and 17 Ves. 160, 163; Andrews *v.* Wrigley, 4 Bro. Ch. R. 125; Mead *v.* Lord Orrery, 3 Atk. 235, 238, 239; McLeod *v.* Drummond, 14 Ves. 355; 17 Ves. 154, 168, 169, 170, 171.

[3] McLeod *v.* Drummond, 14 Ves. 355; S. C. 17 Ves. 154, 158, 169, 170, 171; Andrews *v.* Wrigley, 4 Bro. Ch. R. 125; Scott *v.* Tyler, 2 Bro. Ch. R. 431; 2 Dick. R. 724; Keane *v.* Roberts, 4 Madd. R. 357.

[4] McLeod *v.* Drummond, 14 Ves. 361, 362; S. C. 17 Ves. 154, 155, 158 to 171; Hill *v.* Simpson, 7 Ves. 152.

[5] Ibid. See, also, Mr. Roscoe's learned note to Whale *v.* Booth, 4 Doug. R. 47, note (66).

[6] Keane *v.* Roberts, 4 Madd. Rep. 357, 358. See, also, Ram on Assets,

he,) "who acquires personal assets by a breach of trust or a *devastavit* by the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying, or receiving, as a pledge for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise; because this sale or pledge is held to be *prima facie* consistent with the duties of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is *prima facie* inconsistent with the duty of an executor. I preface both of these propositions with the term 'generally speaking,' because they both seem to admit of exceptions." And it may be added, that whenever there is a misapplication of the personal assets, and the assets or their proceeds can be traced into the hands of any persons affected with notice of such misapplication; there the trust will attach upon the property or proceeds in the hands of such persons, whatever may have been the extent of such misapplication or conversion.[1]

ch. 37, § 4, p. 484; 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*l*); Watkins *v.* Cheek, 2 Sim. & Stu. 205.

[1] See Ram on Assets, ch. 37, § 4, p. 491, 492; Adair *v.* Shaw, 1 Sch. & Lefr. 261, 262. The same principle may be further illustrated by the cases already mentioned, where creditors and others are permitted to sue the debtors of the deceased, when they collude with the executor or administrator, although they are not suable except by the executor or administrator. Lord Brougham, in Holland *v.* Prior, 7 Mylne & Keen, 240, said, "Although the general principle of the Court, for preventing multiplicity of suits, and avoiding circuity of proceeding, is to bring all the

§ 582. In cases where, during coverture, the assets of a feme covert executrix are wasted by the husband, and he then dies, no action at law lies by the creditors against the assets of the husband. But Courts of Equity will in such a case interfere, and relieve the creditors, upon the ground of the breach of trust in the husband, and his conversion of the assets of the wife's testator into funds in aid of his own assets.[1]

§ 583. And here we might treat of the nature and extent of the jurisdiction, which Courts of Equity will exercise in regard to the assets of foreigners, collected under what is called an ancillary administration (because it is subordinate to the original administration) taken out in the country where the assets are locally situate. This subject, however, has been largely discussed in another place, in considering the conflict of the laws of different countries upon the subject of administrations of property situate therein, and, therefore, it will be but very briefly taken notice of here.[2] In general it

parties concerned in the subject-matter before it, and to adjudicate once for all among them; and, although this would lead, in administering the assets of deceased persons, to go beyond the personal representatives, following the estate of the deceased, and taking note of his credits, and consequently bringing forward his debtors; yet the practice of the court has prescribed bounds to the inquiry; and, accordingly, the rule is, to stop short at the personal representatives, unless where there is insolvency, or where other parties stand in such relation to the deceased, or his estate, or his representative, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his representative after his decease, in withdrawing his estate from his creditors, or to have undertaken more directly, *quasi* representative of him." Ante, § 422 to 424; Story on Eq. Pleadings, § 178, 514; Newland *v.* Champion, 1 Ves. 106; Doran *v.* Simpson, 4 Ves. 651; Alsager *v.* Rowley, 6 Ves. 748; Beckley *v.* Dorington, West. Rep. 169; White *v.* Parnther, 1 Knapp, R. 179, 226; Troughton *v.* Binkes, 6 Ves. 572.

[1] Adair *v.* Shaw, 1 Sch. & Lefr. 261, 262, 263.

[2] See Story, Comment. on Conflict of Laws, ch. 13, § 492 to 530.

may be said, that where a domestic executor or administrator collects assets of the deceased in a foreign country, without any letters of administration taken out, or any actual administration accounted for in such foreign country, and brings them home, they will be treated as personal assets of the deceased, to be administered here under the domestic administration.[1] But where such assets have been collected abroad under a foreign administration, and such administration is still open, there seems much difficulty in holding, that the executor or administrator can be called upon to account for such assets under the domestic administration, unless, perhaps, under very peculiar circumstances; since it would constitute no just bar to proceedings under the foreign administration in the Courts of the foreign country.[2] And, indeed, probates of wills and letters of administration are not granted in any country in respect to assets generally, but only in respect to such assets as are within the jurisdiction of the country, by which the probate is established, or the administration granted.[3]

§ 584. Where there are different administrations[4] granted in different countries, those which are in their nature ancillary, are, as we have seen, generally held subordinate to the original administration. But each

[1] Dowdale's case, 6 Co. Rep. 47, 48; S. C. Cro. Jac. 55; Attorney-General v. Diamond, 1 Cromp. & Jervis, 370; Erving's case, 1 Cromp. & Jerv. R. 151; S. C. 1 Tyrw. R. 91.

[2] See Story, Comm. on Conflict of Laws, ch. 13, § 512 to 519. But see Attorney-General v. Diamond, 1 Cromp. & Jerv. 370; Erving's case, 1 Cromp. & Jerv. 151; 1 Tyrw. R. 191.

[3] Ibid.

[4] This and the three following sections are taken almost verbatim from Story's Conflict of Laws, § 518, 524, 525, 528.

administration is deemed so far independent of the other, that property received under one cannot be sued for under another, although it may at the moment be locally situate within the jurisdiction of the latter. Thus, if property is received by a foreign executor or administrator abroad, and afterwards remitted here, an executor or administrator appointed here could not assert a claim to it here, either against the person in whose hands it might happen to be, or against the foreign executor or administrator. The only mode of reaching it, if necessary for the purposes of due administration here, would be to require its transmission or distribution after all claims against the foreign administration had been ascertained and settled abroad.[1]

§ 585. In relation to the mode of administering assets by executors and administrators, there are in different countries very different regulations. The priority of debts, the order of payments, the marshalling of assets for this purpose, and, in cases of insolvency, the modes of proof, as well as of distribution, differ in different countries. In some countries, all debts stand in an equal rank; and, in cases of insolvency, the creditors are to be paid *pari passu*. In others, there are certain classes of debts entitled to a priority of payment, and, therefore, deemed privileged debts. Thus, in England, bond debts and judgment debts possess this privilege; and the like law exists in some of the States of this Union. Similar provisions may be found in the law of France in favor of particular classes of creditors. On the other hand, in Massachusetts, and in many other States of the Union, all debts, except those due to the govern-

[1] Story's Conflict of Laws, § 518.

ment, possess an equal rank, and are payable *pari passu*. Let us suppose, then, that a debtor dies domiciled in a country, where such priority of right and privilege exists, and that he has assets situate in a State where all debts stand in an equal rank, and administration is duly taken out in the place of his domicil, and also in the place of the *situs* of the assets. What rule is to govern in the marshalling of the assets. The law of the domicil, or the law of the *situs?* The established rule now is, that in regard to creditors, the administration of the assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them; and not by that of the domicil of the deceased. The rule has been laid down with great clearness and force on many occasions.[1]

§ 586. The ground upon which this doctrine has been established, seems entirely satisfactory. Every nation, having a right to dispose of all the property actually situate within it, has (as has often been said) a right to protect itself and its citizens against the inequalities of foreign laws, which are injurious to their interests. The rule of a preference, or of an equality, in the payment of debts, whether the one or the other course is adopted, is purely local in its nature, and can have no just claim to be admitted by any other nation, which in its domestic arrangements pursues an opposite policy. And, in a conflict between our own and foreign laws, the doctrine avowed by Huberus is highly reasonable, that we should prefer our own. *In tali conflictu magis est ut jus nostrum, quam jus alienum, servemus.*[2]

[1] Story's Conflict of Laws, § 524. [2] Ibid. § 525.

§ 587. In the course of administrations, also, in different countries, questions often arise as to particular debts, whether they are properly and ultimately payable out of the personal estate, or, whether they are chargeable upon the real estate of the deceased. In all such cases, the setled rule now is, that the law of the domicil of the deceased will govern in cases of intestacy; and, in cases of testacy, the intention of the testator. A case, illustrating this doctrine, occurred in England many years ago. A testator, who lived in Holland, and was seised of real estate there, and of considerable personal estate in England, devised all his real estate to one person, and all his personal estate to another, whom he made his executor. At the time of his death, he owed some debts by specialty, and some by simple contract, in Holland, and had no assets there to satisfy those debts; but his real estate was, by the laws of Holland, made liable for the payment of simple contract debts, as well as specialty debts, if there was not personal assets to answer the same. The creditors in Holland sued the devisee, and obtained a decree for the sale of the lands devised for the payment of their debts. And then, the devisee brought a suit in England against the executor (the legatee of the personalty) for reimbursement out of the personal estate. The Court decided in his favor, upon the ground, that in Holland as in England, the personal estate was the primary fund for the payment of debts, and should come in aid of the real estate, and be charged in the first place.[1]

§ 588. Every ancillary administration is, upon principles of international law, made subservient to the

[1] Story's Conflict of Laws, § 528.

rights of creditors, legatees, and distributees, in the country where such administration is taken out, although the distribution, as to legatees and distributees or heirs, is governed by the law of the place of the testator or intestate's domicil. But a most important question often arises;—What is to be done as to the residue of the assets, after discharging all the debts and other claims of the deceased, due to persons resident in the country where the ancillary administration is taken out? Is it to be remitted to forum of the testator's or intestate's domicil, to be there finally settled, adjusted, and distributed among all the claimants, according to the law of the country of the domicil of the testator or intestate? Or, may creditors, legatees, and distributees of any foreign country come into the Courts of Equity, or other Courts of the country, granting such ancillary administration, and there have all their respective claims adjusted and satisfied, according to the law of the testator's or intestate's domicil, or to any other law? And in cases of insolvency, or other deficiency of assets, what rules are to govern in regard to the rights, preferences, and priorities of different classes of claimants under the laws of different countries, seeking such distribution of the residue?

§ 589. These are questions, which have given rise to very ample discussions in various Courts in the present age, and they have been thought to be not unattended with difficulty. It seems now, however, to be understood as the general result of the authorities, that Courts of Equity of the country where the ancillary administration is granted, (and other Courts, exercising a like jurisdiction in cases of administrations,) are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various

claimants, having equities or rights in the funds, whatever may be their domicil, whether it be that of the testator or intestate, or be in some other foreign country. The question, whether the Court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicil of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals, for the purpose of enforcing the rights of all persons, having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of the jurisdiction.[1]

[1] Harvey *v.* Richards, 1 Mason, R. 381; Dawes *v.* Head, 3 Pick. R. 128; Story's Conflict of Laws, ch. 13, § 513, and the cases in note (2), ibid.

CHAPTER X.

LEGACIES.

§ 590. ANOTHER head of concurrent jurisdiction in Equity is in regard to LEGACIES. This subject has been in part, incidentally treated before; but it is proper to bring the subject more fully under review. It seems that, originally, the jurisdiction over personal legacies was claimed and exercised in the Temporal Courts of Common Law; or, at least, that it was a jurisdiction *mixti fori*, claimed and exercised in the County Court, where the Bishop and Sheriff sat together.[1] Afterwards, (at least from the reign of Henry the Third,) the Spiritual or Ecclesiactical Courts obtained exclusive jurisdiction over the Probate of Wills of personal property; and, as incident thereto, they acquired jurisdiction (though not exclusive) over legacies.[2] This latter jurisdiction still continues in the Ecclesiastical Courts; though it is at present rarely exercised; a more efficient and complete jurisdiction being, as we shall presently see, exercised by Courts of Equity.[3]

[1] Swinb. on Wills, Pt. 6, § 11, p. 430, 431, 432; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 1, and notes (*a*) and (*b*); 2 Black. Comm. 491, 492; 3 Black. Comm. 61, 95, 96; Marriott *v.* Marriott, 1 Str. R. 667, 669, 670; 2 Roper on Legacies, by White, ch. 25, p. 685; 1 Reeves, Hist. of the Law, 92, 308.

[2] Ibid; 3 Black. Comm. 98; Com. Dig. *Prohibition*, G. 17; Bac. Abridg. *Legacies*, M; Atkins *v.* Hill, Cowp. 287.

[3] Bac. Abridg. *Legacies*, M.; 2 Roper on Legacies, by White, ch 25, § 2, p. 693; 5 Madd. R. 357.

§ 591. In regard to legacies, whether pecuniary or specific, it is very clear that no suit will lie at the Common Law to recover them, unless the executor has assented thereto.[1] If no such assent has been given, the remedy is exclusively in the Ecclesiastical Courts or in the Courts of Equity. But in cases of specific legacies of goods and chattels, after the executor has assented thereto, the property vests immediately in the legatee, who may maintain an action at law for the recovery thereof.[2] The same rule has been attempted to be applied at law to cases of pecuniary legacies, where the executor had *expressly* assented thereto; for it is agreed on all sides that the mere possession of assets, without such assent, will not support an action.[3] There are certainly decisions which establish, that in the case of an express promise to pay a pecuniary legacy in consideration of assets, an action will lie at law for the recovery thereof.[4] But these cases seem not to have been decided upon satisfactory principles; and, though they have not been directly overturned in England, they have been doubted and disapproved by Judges as well as by elementary writers.[5]

§ 592. The ground upon which these decisions have been doubted or denied is, the pernicious consequences

[1] Deeks *v.* Strutt, 5 T. Rep. 690.

[2] Doe *v.* Gay, 3 East, R. 120; Paramore *v.* Yardley, Plowd. 539; Young *v.* Holmes, 1 Str. 70; 4 Co. Rep. 28 *b*.

[3] Deeks *v.* Strutt, 5 T. R. 690; Doe *v.* Gay, 3 East, R. 120.

[4] Atkins *v.* Hill, Cowp. R. 284; Hawkes *v.* Saunders, Cowp. R. 289.

[5] See Deeks *v.* Strutt, 5 T. R. 690; Doe *v.* Gay, 3 East, R. 120; 2 Roper on Legacies, by White, ch. 25, § 2, p. 696, 697; Bac. Abridg. *Legacies*, M., Gwillim's note. See also 3 Dyer, Rep. 264 *b*; Beecker *v.* Beccker, 7 Johns. R. 99; Farish *v.* Wilson, Peake, Rep. 73; Mayor of Southampton *v.* Greaves, 8 T. Rep. 583; 2 Madd. Ch. Pr. 1, 2, 3.

which would follow from allowing such an action at law; for Courts of Law, if compellable to entertain the jurisdiction, cannot impose any terms upon the parties. Thus, for instance, a suit might be maintained by a husband for a legacy given to his wife, without making any provision for her, or for her family; whereas, a Court of Equity would require such a provision to be made.[1]

§ 593. But, whether a pecuniary legacy is recoverable at law or not, after an assent thereto by an executor, it is very certain, that Courts of Equity now exercise a concurrent jurisdiction with all other Courts in cases of legacies, whether the executor has assented thereto or not.[2] The grounds of this jurisdiction are various. In the first place, the executor is treated as a trustee for the benefit of the legatees; and, therefore, as a matter of trust, legacies are within the cognizance of Courts of Equity, whether the executor has assented thereto or not. This seems a universal ground for the jurisdiction.[3] In the next place, the jurisdiction is maintainable in all cases, where an account or discovery, or distribution of the assets is sought, upon general principles. Indeed, Lord Mansfield seems to have thought that the jurisdiction arose, as an incident

[1] Deeks *v.* Strutt, 5 T. R. 692. An action at law for a pecuniary legacy has been maintained against an executor after his assent to the legacy, in some of the Courts of America. In some of the States, an action at law is expressly given by statute. See Dewitt *v.* Schoonmaker, 2 Johns. R. 243; Beecker *v.* Beecker, 7 Johns. R. 99; Farwell *v.* Jacobs, 4 Mass. R. 634; Bigelow's Digest, *Legacy*, C.

[2] Franco *v.* Alvares, 3 Atk. 346.

[3] 2 Roper on Legacies, by White, ch. 25, p. 685; Jeremy on Eq. Jurisp. B. 1, ch. 1, § 2, p. 104; Farrington *v.* Knightly, 1 P. Will. 549, 554; Wind *v.* Jekyl, 1 P. Will. 575; Hurst *v.* Beach, 5 Madd. R. 360; 2 Madd. Ch. Pract. 1, 2.

to discovery and account.[1] In the next place, there is, in many cases, the want of any adequate or complete remedy in any other Court.[2]

§ 594. Obvious as some of these grounds are to found a general jurisdiction in Equity in cases of legacies, it does not appear that the jurisdiction was familiarly exercised until a comparatively recent period. Lord Kenyon, indeed, has said, the jurisdiction over questions of legacies was not exercised in Equity until the time of Lord Chancellor Nottingham.[3] In this remark, Lord Kenyon was probably under some slight mistake; for traces are found of an exercise of the jurisdiction, as early as the time of Lord Chancellor Ellesmere, in cases where the defendant answered the bill, and took no exceptions; although he appears to have entertained the opinion that the Ecclesiastical Courts were more proper to give relief in cases of legacies.[4] But it is highly probable that the jurisdiction was not firmly established beyond controversy until Lord Nottingham's time.

§ 595. Indeed, in many cases, Courts of Equity exercise an exclusive jurisdiction in regard to legacies; as, for instance, where the bequest of the legacy involves the execution of trusts, either express or implied; or where the trusts, ingrafted on the bequest, are themselves to be pointed out by the Court; for, (as we have seen,) the Spiritual Courts cannot, any more

[1] Atkins *v.* Hill, Cowper, R. 287; 2 Madd. Ch. Pract. 1, 2.
[2] 2 Madd. Ch. Pr. 1, 2, 3; Franco *v.* Alvares, 3 Atk. 346.
[3] Deeks *v.* Strutt, 5 T. Rep. 692.
[4] 2 Madd. Ch. Pr. 1, 2.

than the Temporal Common Law Courts, enforce the execution of trusts.[1]

§ 596. It is upon this account, that where a testator, by his will, has not disposed of the surplus of his personal estate, the Spiritual Courts have no authority to decree distribution of it; for, in such a case, the executor is at law entitled to it; although, under circumstances, he may in Equity be held to be a trustee for the next of kin.[2] And therefore it is, that if the

[1] 2 Roper on Legacies, by White, ch. 25, § 2, p. 693; Farrington *v.* Knightly, 1 P. Will. 549; Anon. 1 Atk. R. 491; Hill *v.* Turner, 1 Atk. 516; Att. Gen. *v.* Pyle, 1 Atk. 435.

[2] 2 Madd. Ch. Pr. 1, 2, 3; Farrington *v.* Knightly, 1 P. Will. 549, 550, 553, 554, and Mr. Cox's note (1); Id. 550; Petit *v.* Smith, 1 P. Will. 7; Hatton *v.* Hatton, 2 Str. R. 865; Ante, § 536, 537. At law the appointment of an executor is deemed to be a virtual gift to him of all the surplus of the personal estate, after the payment of all debts and legacies. But, in Equity he is considered a mere trustee of such surplus, for the benefit of the next of kin, if, from the nature and circumstances of the will, a presumption arises, that the testator did not intend that the executor should take such surplus to his own use. The effect of the doctrine, therefore, is, that the legal right of the executor will prevail, unless there are circumstances which repel that conclusion. Wilson *v.* Ivat, 2 Ves. 165; Bennett *v.* Bachelor, 1 Ves. jr. 67; Dawson *v.* Clarke, 18 Ves. 254; Haynes *v.* Littlefear, 1 Sim. & Stu. 496. What circumstances will be sufficient to turn the legal estate of the executor into a trust, is a matter which would require a very large discussion, in order to bring before the reader all the appropriate learning. It is, in truth, rather a matter of presumptive evidence, than of Equity Jurisdiction. The subject is amply treated in Jeremy on Equity Jurisd. B. 1, ch. 1, § 2, p. 122 to 135; and in 2 Roper on Legacies, by White, ch. 24, p. 579; Id. 590 to 640. It may, however, be generally stated, that where there arises upon the face of the will a presumption that the executor is not to take the surplus for his own use; there, parol evidence may be admitted, on his part, to repel the presumption; or, on the part of the next of kin, to confirm it. But, if no such presumption arises on the face of the will, parol evidence is not admissible, on the part of the next of kin, to show that the executor was not intended to take beneficially. Ibid.; 1 Roper on Legacies, by White, ch. 6, § 2, p. 337, 338; White *v.* Williams, 3 Ves. & B. 72, 73; Langham *v.* Sandford, 2 Meriv. R. 17, 18; Hurst *v.* Beach, 5 Madd. R. 360.

Spiritual Courts attempt to enforce the payment of a legacy, which involves a trust, a Court of Equity will award an injunction in order to protect its own exclusive jurisdiction.[1]

§ 597. So, where the jurisdiction in the Spiritual Courts cannot be exercised in a manner adequate to protect the just rights of all the parties concerned in the case of a legacy, Courts of Equity will assume an exclusive jurisdiction, and grant an injunction to stay proceedings of the Spiritual Courts for such legacy. It was upon this account that injunctions were formerly granted by Courts of Equity to proceedings in the Spiritual Courts for a legacy, where there was no offer or requirement of security to refund it, (which such Courts might insist on or not,[2]) in case of a deficiency of assets. For, it was said, that there is a difference between a suit for a legacy in a Court of Equity, and a suit for a legacy in the Spiritual Courts. If, in the Spiritual Courts, they would compel an executor to pay a legacy without security to refund, there a prohibition should go. But, in a Court of Equity, though there be no provision made for refunding, (which was formerly a usual provision, but is now discontinued,) yet the common justice of the Court would compel a legatee to refund.[3]

[1] Roper on Legacies, by White, ch. 25, § 2, p. 693; Anon. 1 Atk. 591.

[2] Nicholas *v.* Nicholas, Prec. Ch. 546, 547; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2; Horrell *v.* Waldron, 1 Vern. 26, 27; Mr. Cox's note B. to Slanning *v.* Style, 3 P. Will. 337.

[3] Noel *v.* Robinson, 1 Vern. 93, 94; Anon. 1 Atk. 491; Hawkins *v.* Day, Ambler, R. 161, 162; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*). In Anon. 1 Atk. 491, Lord Hardwicke said, that the rule of the Court was varied since the case in 1 Vern. 93; for legatees are not obliged to give security to refund upon a deficiency of assets. See Ante, § 537, 538. In Hawkins *v.* Day, Ambler, R. 162, Lord Hardwicke said: "The

§ 598. But there are other instances illustrative of the same principle of exclusive jurisdiction, of a more general character, and dependent upon the state of the legatee. Thus, if a legacy is given to a married woman, and her husband sues therefor in the Spiritual Court, a Court of Equity will grant an injunction; for the Spiritual Court has no authority (as we have seen) to require him to make a suitable settlement on her and her family, as a Court of Equity has; and, therefore, to allow the suit in the Spiritual Court to proceed, would enable the husband to do injustice to her rights, and to defeat her Equity to a settlement.[1]

§ 599. In general, it is true, that, in cases of concurrent jurisdiction, (as of legacies,) that Court, which is first in possession of the cause, is entitled to go on with it; and no other Court ought to intermeddle with it. But this rule is applicable only to cases where the same remedial justice can be administered in each Court, and the same protection furnished by each to the rights of the parties.[2] In cases of married women, it is obvious from what has been above stated, that the same remedial justice cannot be administered in each Court; and, therefore, Courts of Equity will insist upon making it exclusive.

§ 600. In like manner, in the case of infants, to whom legacies are given, Courts of Equity will inter-

rule of this Court to grant prohibitions, in case legatees sue in the Spiritual Court, and refuse to give security, is out of use now. But this Court will decree a legatee to refund."

[1] Meals *v.* Meals, 1 Dick. R. 373; Anon. 1 Atk. 491; Hill *v.* Turner, 1 Atk. R. 516; Jewson *v.* Moulson, 2 Atk. 419, 420; Prec. Ch. 548; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*); 2 Mad. Ch. Pr. 2; Ante, § 539, 592.

[2] Nicholas *v.* Nicholas, Prec. Ch. 546, 547.

fere, and exercise an exclusive jurisdiction, and prevent proceedings in the Spiritual Court by an injunction; for Courts of Equity can give proper directions for securing and improving the fund, which the Spiritual Court cannot do. And, indeed, it would be proper for the executor to resort to a Court of Equity in order to procure suitable indemnity for the payment of the legacy, and security to refund in case of a deficiency of assets.[1]

§ 601. In cases where a discovery of assets is required, or the due administration and settlement of the estate is indispensable to the rights of the legatees, as in the case of residuary legatees, it follows, of course, that Courts of Equity should entertain the exclusive jurisdiction, since they alone are competent to such an investigation. But this subject has been already sufficiently examined under the preceding head of the jurisdiction of Courts of Equity in cases of administrations.[2]

§ 602. In regard to legacies charged on land, Courts of Equity, for the reasons already stated, also exercise an exclusive jurisdiction, for the Spiritual Courts have no cognizance of legacies chargeable on lands, but only of purely personal legacies.[3] In deciding upon the validity and interpretation of purely personal legacies, Courts of Equity implicitly follow the rules of the Civil Law, as recognized and acted on in the Spiritual Courts.[4] But in legacies chargeable on land, they fol-

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[1] Horrell *v.* Waldron, 1 Vern. R. 26; Nicholas *v.* Nicholas, Prec. Ch. 516, 547; 2 Roper on Legacies, by White, ch. 25, § 2, p. 694; Ante, § 539, 597.

[2] Ante, § 534.

[3] Reynish *v.* Martin, 3 Atk. 333.

[4] Ibid.; Franco *v.* Alvares, 3 Atk. R. 346; Hurst *v.* Beach, 5 Madd. R. 360; 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, and note (*h*). But see Cray *v.* Willis, 2 P. Will. 530.

low the rules of the Common Law, as to the validity and interpretation thereof.[1]

§ 603. But the beneficial operation of the jurisdiction of Courts of Equity, in cases of legacies, is even more apparent in some other cases, where the remedies are peculiar to such Courts, and are protective of the rights and interests of legatees. Thus, for instance, in cases of pecuniary legacies, due and payable at a future day, (whether contingent or otherwise,[2]) Courts of Equity will compel the executor to give security for the due payment thereof;[3] or, what is the modern, and perhaps, generally, the more approved practice, will order the fund to be paid into court, even if there be not any actual waste, or danger of waste of the estate.[4]

[1] Reynish *v.* Martin, 3 Atk. 333, 334; Paschall *v.* Keterich, Dyer, 151 *b*, (5). But see Dyer, 264 *b*.

[2] Formerly a distinction was taken between cases of contingent and cases of absolute legacies, payable in futuro; the latter were entitled to be made secure in Equity; the former were not. See Palmer *v.* Mason, 1 Atk. R. 505; Heath *v.* Perry, 3 Atk. 101, 105. But that distinction is now overruled. See Mr. Saunders's note to Heath *v.* Perry, 3 Atk. 105, note (1); Mr. Blunt's note to Ferrand *v.* Prentice, Ambler, R. 273, note (1); Johnson *v.* De la Creuze, cited 1 Bro. Ch. R. 105; Green *v.* Pigott, 1 Bro. Ch. R. 103, 105; Flight *v.* Cook, 2 Ves. 619; Gawler *v.* Standerwick, 2 Cox, R. 15, 18; Carey *v.* Askew, 2 Bro. Ch. R. 55; Jeremy on Eq. Jurisd. B. 3, ch. 2, § 2, p. 351, 352; Studholme *v.* Hodgson, 3 P. Will. 300, 303, 304; Johnson *v.* Mills, 1 Ves. 282, 283; 1 Madd. Ch. Pr. 180, 181; Post, § 844, 848.

[3] 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 2, note (*d*); Rous *v.* Noble, 2 Vern. 249; S. C. 1 Eq. Abridg. 238, Pl. 22; Duncumban *v.* Stint, 1 Cas. Ch. 121.

[4] Johnson *v.* Mills, 1 Ves. R. 282; Ferrand *v.* Prentice, Ambler, R. 273; S. C. 2 Dick. R. 569; Phipps *v.* Annesley, 2 Atk. R. 58; Green *v.* Pigott, 1 Bro. Ch. R. 104; Webber *v.* Webber, 1 Sim. & Stu. R. 311; Johnson *v.* De la Creuze, 1 Bro. Ch. R. 105; Strange *v.* Harris, 3 Bro. Ch. R. 365; Yare *v.* Harrison, 2 Cox, R. 377; Slanning *v.* Style, 3 P. Will. 336; Batten *v.* Earnley, 2 P. Will. 163; Jeremy on Eq. Jurisd.

§ 604. Another class of cases of the same nature is, where a specific legacy is given to one for life, and after his death to another; there, the legatee in remainder was formerly entitled in all cases to come into a Court of Equity, and to have a decree for security from the tenant for life for the due delivery over of the legacy to the remainder-man. But the modern rule is, not to entertain such a bill, unless there be some allegation and proof of waste; or of danger of waste of the property. Without such ingredients, the remainder-man is only entitled to have an inventory of the property bequeathed to him, so that he may be enabled to identify it; and, when his absolute right accrues, to enforce a due delivery of it.[1]

B. 3, ch. 2, § 2, p. 351, 352; Blake *v.* Blake, 2 Sch. & *Lefr.* 26. In Slanning *v.* Style, 3 P. Will. 336, it was said by Lord Talbot: "Generally speaking, where the testator thinks fit to repose a trust, in such a case, until some breach of that trust be shown, or at least a tendency thereto, the Court will continue to intrust the same hand, without calling for any other security than what the testator has required." Yet in that very case, where an annuity was charged on the residue of the personal estate of the testator, he ordered assets, to the amount necessary to secure it, to be brought into Court. But where there is any danger of loss or deterioration of the fund, Courts of Equity, in all cases, used to require security. Rous *v.* Noble, 2 Vern. 249; S. C. 1 Eq. Abridg. 238, Pl. 22. But the modern practice seems to be (as stated in the text) to have the money paid into Court; though it is certainly competent for the Court to adopt either course.

[1] 1 Madd. Ch. Pr. 178, 179; Bracken *v.* Bentley, 1 Ch. Rep. 110; Anon. 2 Freem. R. 206; Foley *v.* Burnell, 1 Bro. Ch. 279; Slanning *v.* Style, 3 P. Will. 335, 336; Hyde *v.* Parrat, 1 P. Will. 1; Batten *v.* Earnley, 2 P. Will. 163; Leeke *v.* Bennett, 1 Atk. 471; Bill *v.* Kinaston, 2 Atk. 82; Henderson *v.* Vaulx, 10 Yerger, 30; Covenhoven *v.* Shuler, 2 Paige, R. 122, 132. This last case involved the question, what was to be done, in case of a bill bequeathing to a wife the one third of the residue of the personal estate of the testator, and also the use of the residue during her widowhood; and it was held by Mr. Chancellor Walworth, that the widow was bound to account for the whole personal

§ 605. This may suffice, in this place, on the subject of the peculiar jurisdiction of Courts of Equity in

estate; and, that the two thirds of the residue of the personal estate, which was bequeathed over after the death of the wife, ought to be invested in permanent securities, and the income thereof paid to the wife during her widowhood; and, after her death or marriage, to the legatees in remainder. The learned Chancellor on that occasion said: "The modern practice, in such cases is, only to require an inventory of the articles, specifying that they belong to the first taker for the particular period only, and afterwards to the person in remainder; and security is not required unless there is danger that the articles may be wasted, or otherwise lost to the remainder-man. Foley *v.* Burnell, 1 Bro. Ch. Cas. 279; Slanning *v.* Style, 3 P. Will. 336. Whether a gift for life, of specific articles, as of hay, grain, &c., which must necessarily be consumed in the using, is to be considered an absolute gift of the property, or whether they must be sold, and the interest or income only of the money applied to the use of the tenant for life, appears to be a question still unsettled in England. 3 Ves. 314; 3 Mer. 194. But none of these principles, in relation to specific bequests of particular articles, whether capable of a separate use for life, or otherwise, are applicable to this case. Where there is a general bequest of a residue for life with a remainder over, although it includes articles of both descriptions, as well as other property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life. This distinction is recognized by the Master of the Rolls, in Randall *v.* Russell, 3 Mer. R. 193. He says, if such articles are included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life. This is also recognized by Roper and Preston, as a settled principle of Law in England. Prest. on Leg. 96; Roper on Leg. 209. See also Howe *v.* Earl of Dartmouth, 7 Ves. 137, and cases in the notes. [Mills *v.* Mills, 7 Sim. 501; Fryer *v.* Butler, 8 Sim. 442; Benn *v.* Dixon, 10 Sim. 636; Cope *v.* Bent, 5 Hare, 36; Hunt *v.* Scott, 1 De Gex & Sm. 212; Horne *v.* Horne, 14 Jurist, 359; Neville *v.* Fortescue, 16 Sim. 333; Morgan *v.* Morgan, 7 Eng. Law & Eq. R. 216. But a gift of the interest of £1,000, has been lately held a bequest of the absolute property. Humphrey *v.* Humphrey, 6 Eng. Law & Eq. R. 113.] The case of Dewitt *v.* Schoonmaker (2 Johns. R. 243) seems to be in collision with this principle. But Mr. Justice Tompkins, who delivered the opinion of the Court there, does not appear to have noticed the distinction between the bequest of a general residue and the bequest of specific articles. He says, however, it was the duty of the executors, on the death of the

cases of legacies, where the relief sought and given is of a precautionary and protective nature. The subject will again come under review in the consideration of bills *quia timet.*[1]

§ 606. In regard to a donation *mortis causâ*, which is a sort of amphibious gift, between a gift *inter vivos*, and a legacy, it is not properly cognizable by the Ecclesiastical Courts; neither does it fall regularly within an administration; nor does it require any act of the executor to constitute a title in the donee.[2] It is properly a gift of personal property, by a party, who is in peril of death, upon condition, that it shall presently

widow, to have paid and delivered the personal estate to the residuary legatee. If such was their duty, they were not bound to deliver the principal of the estate into her hands, without requiring security, that it should be preserved and paid over to the residuary legatee after her death. That case was correctly decided; for it was manifestly the intention of the testator, that the property should be delivered over to the son after the death of the widow, and that he should pay the legacy to his sister. This Court presumed he had received the property agreeably to the directions of the will, and the executors were held not to be liable to the legatee in a Court of Law. In the case before me, the widow was not entitled to the use or possession of any specific article of the personal estate; but only to one third of the principal, and the interest or income of two thirds of the remainder of the general residue, after the debts of the testator and the legacy to Mrs. Cady were paid or satisfied. The complainants are therefore entitled to an account of all the personal estate of the testator in value, as it existed at the death of their father; and, after deducting the legacy to Mrs. Cady, and the funeral charges and the expenses of administration, their share of the balance must be invested in permanent securities, and the income thereof paid to Lena Shuler during her life or widowhood; and the principal, after her death or marriage, must go to the complainants."

[1] Post, § 814, 945, 846.

[2] 1 Roper, Leg. by White, ch. 1, § 2, p. 2; Thompson *v.* Hodgson, 2 Str. R. 777; Ward *v.* Turner, 2 Ves. 431; Miller *v.* Miller, 3 P. Will. 356; 3 Wooddeson, Lect. 60, p. 513; Hedges *v.* Hedges, Prec. Ch. 269; Gilb. Eq. R. 12; 2 Vern. 615.

belong to the donee, in case the donor shall die,[1] but not otherwise.[2] To give it effect, there must be a delivery of it by the donor; and it is subject to be defeated by his subsequent personal revocation,[3] or by his recovery or escape from the impending peril of death.[4] If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime; and therefore, in no sense is it a testamentary act.[5] And this is the reason why the Ecclesiastical Courts have no jurisdiction, as they can interpose only in testamentary matters. Courts of Equity, however, maintain a concurrent jurisdiction in all cases of such donations, where the remedy at law is not adequate or complete. But, in such cases, the jurisdiction stands upon general grounds, and not upon any notion that a donation *mortis causâ* is, from its own nature properly cognizable therein.

[1] See the late case of Staniland *v.* Willnott, 3 Mac. & Gord. 664; Hebb *v.* Hebb, 5 Gill, 507.

[2] Ibid.; Wells *v.* Tucker, 3 Binn. R. 366, 370; Edwards *v.* Jones, 1 Mylne & Craig, 226; S. C. 7 Sim. R. 325; 1 Williams on Executors, Pt. 2, B. 2, ch. 2, § 4, p. 544 to 551 (edit. 1838); Duffield *v.* Elwes, 1 Bligh, R. 530, N. S.; Lawson *v.* Lawson, 1 P. Will. 441; Hedges *v.* Hedges, Prec. Ch. 269; Gilb. Eq. Rep. 12; 2 Vern. R. 615; Tate *v.* Hilbert, 2 Ves. jr., 121; S. C. 4 Bro. Ch. R. 290; Miller *v.* Miller, 3 P. Will. 357; Irons *v.* Smallpiece, 2 Barn. & Ald. 552, 553; Farquharson *v.* Cave, 2 Collyer, R. 356.

[3] Parker *v.* Marston, 27 Maine, 196.

[4] Ibid.; 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 544, 545, 546, 547; Ward *v.* Turner, 2 Ves. 431; Jones *v.* Selby, Prec. Ch. 300; Grattan *v.* Appleton, 3 Story, 755.

[5] Ibid. Mr. Williams, in his excellent work on the Law of Executors and Administrators, says: "That to constitute a *donatio mortis causâ*, there must be two attributes. (1.) The gift must be with a view to the donor's death. (2.) It must be conditioned to take effect only on the death of the donor by the existing disorder. A third essential quality is required by our law, which, according to some authorities, was not neces-

§ 606 *a*. We have had occasion to say, that a *donatio mortis causâ* is of an amphibious nature,[1] — partaking of the character of a gift *inter vivos*, and of a legacy. It differs from a legacy in these respects: (1.) It need not be proved, nay it cannot be proved, as a testamentary act, in the Ecclesiastical Courts; for it takes effect as a gift from the delivery by the donor to the donee in his lifetime. (2.) It requires no assent, or other act, on the part of the executor or administrator, to perfect the title of the donee. The claim is not from the executor or administrator, but against him. It differs from a gift *inter vivos*, in several respects, in which it resembles a legacy. (1.) It is ambulatory, incomplete, and revocable, during the donor's lifetime. (2.) It may be made to the wife of the donor. (3.) It is liable to the debts of the donor upon a deficiency of assets.[2]

§ 607. The notion of a donation *mortis causâ* was

sary according to the Roman and Civil Law, namely: (3.) There must be a delivery of the subject of the donation." 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 544, (edit. 1838.) See the remarks on this last point by Lord Hardwicke, in Ward *v.* Turner, 1 Ves. 439, 440, 441; Voet, ad Pand. Lib. 39, tit. 6, § 6; Tate *v.* Hilbert, 2 Ves. jr., 111, 112. [A mere delivery to an agent in the character of agent for the giver, would amount to nothing; it must be a delivery to the legatee, or some one for the legatee. Farquharson *v.* Cave, 2 Collyer, R. 356. See Moore *v.* Darton, 7 Eng. Law & Eq. R. 134; Wells *v.* Tucker, 3 Binney, 366, 370; McGillicuddy *v.* Cook, 5 Blackf. 179, 180; 15 Maine, 429; 18 Id. 225; 21 Id. 185.]

[1] [See an accurate exposition of the nature of this gift in Nicholas *v.* Adams, 2 Wharton, 17; Raymond *v.* Sellick, 10 Conn. 480; Harris *v.* Clark, 2 Barbour, S. C. 94; Parish *v.* Stone, 14 Pick. 198; Miller *v.* Jeffries, 4 Grattan, 472; Sims *v.* Walker, 8 Humph. 503; Brinckerhoff *v.* Lawrence, 2 Sandford, 401.]

[2] 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 552 (edit. 1838); 1 Roper on Legacies, by White, ch. 1, § 2, p. 2, 3, (3d edit.); Bornemans *v.* Sidlinger, 15 Maine, 429.

originally derived into the English law from the Civil Law. In that law it was thus defined: — *Mortis causâ Donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is, qui accepit. Sin autem supervixisset is, qui donavit, reciperit; vel si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.*[1] It was a long time a question among the Roman lawyers, whether a donation *mortis causa* ought to be reputed a gift, or a legacy, inasmuch as it partakes of the nature of both (*et utriusque causæ quædam habebat insignia*); and Justinian finally settled, that it should be deemed of the nature of legacies: *Hæ mortis causa Donationes ad exemptum legatorum redactæ sunt per omnia.*[2]

§ 607 *a.* We have already seen that by our law there can be no valid donation *mortis causa;* (1.) unless the gift be with a view to the donor's death; (2.) unless it be conditioned to take effect only on the donor's death by his existing disorder, or in his existing illness; and (3.) unless there be an actual delivery of the subject of the donation. This last requisite has been thought, by some learned judges, to belong exclusively to our law, and not to have existed in the Roman Law.[3] But a more important practical question is, what may be the subject of a *donatio mortis causa.* There is no doubt that there may be a good donation of any thing which has a physical existence, and admits of a corporal delivery; as, for example of jewels, gems, a bag of money, a trunk of goods; and even of

[1] Inst. Lib. 2, tit. 7, § 1.

[2] Ibid.; Tate *v.* Hilbert, 2 Ves. jr. 118, 119.

[3] See note (1), preceding page. [See also Brown *v.* Markham, Taunt. 221; Walsh *v.* Studdart, 4 D. & W. 159, 285; 2 Colby, 356.]

things of bulk, which are capable of possession by a symbolical delivery; such as goods in a warehouse, by a delivery of the key of the warehouse.[1] But the question was formerly mooted whether choses in action, bonds, and other incorporeal rights, could pass by a donation *mortis causâ*. The doctrine now established is, that not only negotiable notes and bills of exchange, payable to bearer, or indorsed in blank, exchequer notes, and bank notes, may be the subjects of a *donatio mortis causa*, because they may, and do, in the ordinary course of business, pass by delivery; but that bonds and mortgages may also be the subjects of a *donatio mortis causa*, and pass by the delivery of the deeds and instruments, by which they are created.[2] Bonds have been so held, upon the ground that a bond could not be sued for at law without a profert; and that a Court of Equity would not, after a *donatio mortis causa*, accompanied with a delivery of the bond to the donee, direct the latter to give it up to the personal representative of the donor, but would hold the title of the donee to it good.[3] And mortgaged deeds, when delivered,

[1] See Ward *v.* Turner, 2 Ves. 443; 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 547, 548, 549; Burn *v.* Markham, 7 Taunt. R. 224; Miller *v.* Miller, 3 P. Will. 356. See also Rankin *v.* Wagnelin, at the Rolls, 14 June, 1832, cited in Chitty on Bills, Addenda, p. 791, 8th edit. 1833; Id. p. 2, note (*a*), 9th edit.

[2] Ibid.; Drury *v.* Smith, 1 P. Will. 405; Miller *v.* Miller, 3 P. Will. 356. See also Pennington *v.* Gittings, 2 Gill. & John. R. 208; Bradley *v.* Hunt, 5 Gill. & John. 54; Hill *v.* Chapman, 2 Bro. Ch. R. 612; Jones *v.* Selby, Prec. Ch. 300; 1 Roper on Legacies, by White, ch. 1, § 2, p. 13, 14, 15, 16, (3d edit.); Ward *v.* Turner, 1 Ves. 441, 442.

[3] Ibid.; Gardner *v.* Parker, 3 Madd. R. 184; Snelgrove *v.* Bailey, 3 Atk. 214; Duffield *v.* Elwes, 1 Bligh, N. S. R. 542; Staniland *v.* Willnott, 3 Mac. & Gord. 676; Ward *v.* Turner, 2 Ves. 441, 442. In this last case, Lord Hardwicke said: "In Bailey *v.* Snelgrove, determined by me, 11th March, 1774, it was urged, where a bond was given in prospect

are treated but as securities for debts, and would, in the hands of the donee, be governed by the same rules. The delivery, in the case of a mortgage, is, therefore, treated, not as a complete act, passing the property, but as creating a trust, by operation of law, in favor of the donee, which a Court of Equity will enforce, in the same manner as it would the right of the donee to a bond.[1] In short, in all cases in which a *donatio mortis causa* is carried into effect by a Court of Equity, the Court has not considered the interest as completely vested by the gift; but that it is so vested in the donee, that the donee has a right to call on a Court of Equity for its aid; and, in case of personal estate, to

[1] of death, the manner of gift was admitted, the bond was delivered, and I held it a good donation *mortis causâ*. It was argued that there was a want of actual delivery there, or possession, the bond being but a *chose in action*, and, therefore, there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go farther; and I choose to stop here. But I am of opinion that decree was right, and differs from this case; for, though it is true, that a bond, which is specialty, is a *chose in action*, and its principal value consists in the thing in action, yet some property is conveyed by the delivery; for the property is vested; and to this degree, that the law-books say, the person to whom this specialty is given, may cancel, burn, and destroy it. The consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a *profert in Curia*. Another thing made it amount to a delivery; that the law allows it a locality; and, therefore, a bond is *bona notabilia*, so as to require a prerogative administration, where a bond is in one diocese, and goods in another. Not that this is conclusive. This reasoning I have gone upon, is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend, he applied it to a donation *mortis causâ;* for, if to a donation *inter vivos*, I doubt he went too far." See also Wells *v.* Tucker, 3 Binn. R. 366; Bradley *v.* Hunt, 5 Gill. & John. R. 54; [Grover *v.* Grover, 21 Pick. 264.]

Duffield *v.* Elwes, 1 Bligh, R. N. S. 497, 530, 534, 535, 536, 541, 542, which overrules the decision of the Vice-Chancellor in the same case. 1 Sim. & Stu. 243.

compel the executor or administrator of the donor to carry into effect the intention manifested by the person whom he represents; as, for example, if the donation be a bond, to compel the executor or administrator to allow the donee to use his name in suing the bond, upon being indemnified; because it is a trust for the donee.[1]

[1] Duffield *v.* Elwes, 1 Bligh, N. S. R. 497, 530, 534; Staniland *v.* Willnott, 3 Mac. & Gord. 676; Gardner *v.* Parker, 3 Madd. R. 184. We have already extracted, in another place, (Ante, § 433, note 3,) a part of the opinion of Lord Eldon on this subject, which it may, perhaps, be useful here to repeat. "The question," (said he) "is this, Whether the act of the donor, being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, — in respect of personalty, the executor, and, in respect of realty, the heir at law, — are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, Where it is the gift of a personal chattel, or the gift of a deed, which is the subject of the *donatio mortis causâ*, whether, after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee; and whether, on the other hand, if it be a gift affecting the real interest, — and I distinguish now between a security upon land and the land itself, — whether, if it be a gift of such an interest in law, the heir at law of the testator is not, by virtue of the operation of the trust, which is created, not by indenture but a bequest arising from operation of law, a trustee for that donee." His Lordship afterwards, in discussing the point, Whether a mortgage would pass by a delivery of it as a donation *mortis causâ*, said: — "Lord Hardwicke, with respect to the bond, (and it is necessary that I should take some notice of this, because there has been a change in the law, which that great Judge did not foresee, but which in later times, and in my own time, has become very familiar in the Courts of Law,) — Lord Hardwicke states, as one ground of his opinion, in the case of the bond, that it is a good gift *causâ mortis*, because he says, he who has got the bond, may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it; for, says Lord Hardwicke, no man ever heard, — (and I have seen in the manuscript of the same Lord Hardwicke, that he said no man will ever hear,) — that a person shall bring an action upon a bond without the *profert* of that bond. But we now have got into a practice of sliding from Courts of Equity into Courts of Law, the doctrine respecting lost instruments; and I take the liberty, most humbly, of saying that, when that doctrine was so trans-

§ 607 *b*. The same doctrine is applicable to the case of a *donatio mortis causa* of a bond and mortgage by the mortgagee to the mortgagor, consummated by the delivery of the bond and mortgage to him. In such a case, it will operate as a release or discharge of the debt, if the donor should die of his existing illness. For, (it has been said,) if it was a gift *inter vivos*, the mortgagee could not get back the deeds from the mortgagor; but, by operation of law, a trust would be created in the mortgagee, to make good a gift of the debt to the mortgagor, to whom he had delivered the deeds.[1]

planted, it was transplanted upon the idea that the thing might be as well conducted in a Court of Law as in a Court of Equity, — a doctrine which cannot be held by any person who knows what the doctrine of Courts of Equity is as to a lost instrument. Then, if the delivery of a bond would, as it is admitted (notwithstanding any change in the doctrine about *profert*) if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, Whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing, or giving him authority to sue upon the bond, what are we to do with the other securities, if they are not given up? But there is another question to which an answer is to be given: — What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other, the judgment, which is to be considered on the same ground as a specialty, is delivered. With that the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, Whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, whose circumstances do not as effectually give the property in the debt, as if the debt was secured by a bond only? The opinion which I have formed, is, that this is a good *donatio mortis causâ*, raising by operation of law a trust; a trust, which, being raised by operation of law, is not within the Statute of Frauds, but a trust which a Court of Equity will execute."

1 Richards *v.* Symes, 2 Atk. 319; 2 Barnard, R. 90; 2 Eq. Abridg. 647; Duffield *v.* Elwes, 1 Bligh, Rep. 537, 538, 539, N. S.; Hurst *v.* Beach, 5 Madd. R. 351.

But, however this may be, it seems clear that in the case of such a *donatio mortis causa*, the representatives of the donor would never be permitted to enforce the mortgage or bond against the donee.[1]

§ 607 *c*. On the other hand, as by our law there must be a delivery of the thing, or of the instrument which represents it, in order to make a good *donatio mortis causa*, if the thing is incapable of delivery it cannot be the subject of such donation; for it is said, there must be a parting with the legal power and dominion over the thing, which is evidenced only by the delivery. Thus, a mere chose in action, not subsisting in any specific instrument, cannot pass by a *donatio mortis causa*. So, it has been ruled, that a promissory note or bill of exchange, not payable to bearer, or indorsed in blank, cannot so take effect, inasmuch as no property therein can pass by the delivery of the instrument.[2] So, it has been ruled, that South Sea Annuity Receipts cannot be the proper subject of a *donatio mortis causa*; because the delivery thereof does not pass the property in the annuities; and stocks and annuities are, by act of Parliament, made capable of a transfer of the legal property.[3] But it may admit of doubt, whether the doc-

[1] Ibid.

[2] Miller *v*. Miller, 3 P. Will. 356, 358; Ward *v*. Turner, 2 Ves. 442, 443; Pennington *v*. Gettings, 2 Gill & Johns. R. 208; Bradley *v*. Hunt, 5 Gill & Johns. R. 54. [*Contrà*, Grover *v*. Grover, 24 Pick. 261; Brown *v*. Brown, 18 Conn. 410.]

[3] Ward *v*. Turner, 2 Ves. sen. 431, 442, 443. Lord Hardwicke, on this occasion said: "Therefore, from the authority of Swinburne, and all these cases, the consequence is, that by the Civil Law, as received and allowed in England, and consequently by the law of England, tradition or delivery is necessary to make a good donation *mortis causâ*; which brings it to the question, Whether delivery of the three receipts was a sufficient delivery of the thing given to effectuate the gift. I am of opinion it was

trine of these last cases can now, upon principle, be supported; for the ground, upon which Courts of

not. It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of any thing by way of symbol is sufficient. But I cannot agree to that. Nor do I find any authority for that in the Civil Law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the Civil Law requires it, they require actual tradition, delivery over of the thing. So in all cases in this Court; delivery of the thing given is relied on, and not in the name of the thing; as in the delivery of sixpence, in Shargold *v.* Shargold; if it was allowed any effect, that would have been a gift *mortis causâ*, not as a will; but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to be held good, is Jones *v.* Selby. But I am of opinion, that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore it was rightly compared to the cases upon 21 J. 1, Ryal *v.* Rowles and others. It never was imagined on that statute, that delivery of a mere symbol, in name of the thing, would be sufficient to take it out of that statute; yet, notwithstanding, delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession; because it is the way of coming at the possession, or to make use of the thing; and, therefore the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for, if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail, as to the identity of the person coming to receive; but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no color for it; it is no evidence of the thing, or part of the title to it. For, suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed, (which was a very common way formerly, and is frequently seen in the evidence of ancient titles,) and the mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causâ* by force of that act. Nor does it appear to me by proof, that possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death; for there is a witness, who speaks, that in some short time before his death, Fly showed him these receipts, and said he intended them for his uncle Mosely. Therefore, I am of opinion, it would be most dangerous

Equity now support donations *mortis causa*, is not, that a complete property in the thing must pass by the delivery; but that it must so far pass, by the delivery of the instrument, as to give a title to the donee to the assistance of a Court of Equity to make the donation complete.[1] The doctrine no longer prevails, that where a delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa;* because it would not prevent the property from vesting in the executor; and, as a Court of Equity will not *inter vivos* compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator.[2] On the contrary, the doctrine now established by the highest authority is, (as we have seen,) that Courts of Equity do not consider the interest, as completely vested in the donee, but treat the delivery of the instrument as creating a trust for the donee, to be enforced in Equity.[3]

to allow this donation *mortis causâ*, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance. And if these annuities are called *choses in actian*, there is less reason to allow of it in this case, than in any other *chose in action;* because stocks and annuities are capable of a transfer of the legal property by act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will, as supposed, he might have transferred to Mosely; consequently, this is merely legatary, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than ever was yet made; for, if you take away the necessity of delivery of the thing given, it remains merely nuncupative." The decision of Lord Eldon in Duffield *v.* Elwes, 1 Bligh, N. S. R. 498, very much shakes the reasoning of Lord Hardwicke on this particular point.

[1] Grover *v.* Grover, 24 Pick. 261; Brown *v.* Brown, 18 Conn. 410.

[2] Duffield *v.* Elwes, 1 Sim. & Stu. 239, overturned on appeal in 1 Bligh, N. S. R. 498.

[3] Duffield *v.* Elwes, 1 Bligh, N. S. R. 497, 530, 534; Staniland *v.* Willnott, 3 Mac. & Gord. 676. In Pennington *v.* Gittings, 2 Gill & Johns.

§ 607 *d.* According to the Civil Law, a donation *mortis causa* may be made subject to a trust or condition. *Eorum, quibus mortis causa donatum est, fidei committi quoquo tempore potest; quod fidei commissum, hæredes, salva*

R. 208, the Court of Appeals of Maryland held, that a delivery of a certificate of bank stock, transferable at the bank only, personally or by attorney, indorsed in blank by the donor and delivered to the donee, could not pass as a *donatio mortis causâ*. In Bradley *v.* Hunt, 5 Gill & Johns. R. 54, the same learned Court decided that a promissory note, or certificate of the profit, payable to the order of the donor, and delivered to the donee, was not a good *donatio mortis causâ*. In each of these cases the Court proceeded upon the same general ground, that, to constitute a *donatio mortis causâ*, the gift should be full and complete at the time, passing from the donor the legal power and dominion over the thing intended to be given, and leaving nothing to be done by him or his executor to perfect it; and that, in these cases the thing was not susceptible of such delivery, and the delivery of the instrument did not convey a perfect title to the thing. The Court relied upon the cases of Miller *v.* Miller, 3 P. Will. 356, 358; Ward *v.* Turner, 2 Ves. 431; Tate *v.* Hilbert, 2 Ves. jr., 112, and Duffield *v.* Elwes, 1 Sim. & Stu. 239, as in point. But, since the decision in 1 Bligh, N. S. R. 497, these cases can no longer be deemed satisfactory authorities. On the other hand, in Wright *v.* Wright, 1 Cowen, R. 598, the Supreme Court of New York held, that a promissory note *of the donor himself*, executed in his last illness, and delivered by the maker to the donee (the payee) in contemplation of death, was a good *donatio mortis causâ*, although no consideration passed. [But this case has been distinctly overruled in the same Court. Harris *v.* Clark, 2 Barbour, S. C. R. 94; S. C. 3 Comst. 93. See Halley *v.* Adams, 16 Verm. 206; Parish *v.* Stone, 14 Pick. 198; Copp *v.* Sawyer, 6 N. H. R. 386; Smith *v.* Kittridge, 21 Verm. 238; Raymond *v.* Sellick, 10 Conn. 480; Craig *v.* Craig, 3 Barb. Ch. R. 77. So the indorsement by the donor of a note running to him as payee, given *causa mortis*, creates no liability against his estate. Weston *v.* Hight, 17 Maine, 287. But the promissory note of a third person, *not the donor*, unindorsed, is valid. Grover *v.* Grover, 24 Pick. 261.] And in Coutant *v.* Schuyler, 1 Paige, R. 316, Mr. Chancellor Walworth held that a promissory note of a third person was a proper subject of a *donatio mortis causâ*, and might be delivered to a third person for the benefit of the donee. The Court said that there was no real difference between the delivery of a bond, and the delivery of a note, as a *donatio mortis causâ*. Each is valid. See, also, Wells *v.* Tucker, 3 Binn. R. 366.

Falcidiæ ratione, quam in his quoque donationibus exemplo legatorum, locum habere placuit, præstabunt. Si pars donationis fidei commisso teneatur, fidei commissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse respondendum erit ex defuncti voluntate, qui de majore pecunia præstari non dubie voluit, integra.[1] *Ab eo, qui neque legatum neque fidei commissum, neque hæreditatem vel mortis casua donationem accepit nihil per fidei commissum relinqui potest.*[2] The point does not seem to have been directly established in modern Equity Jurisprudence; but the manifest inclination of the Courts is, to sustain such a donation, although it is coupled with a trust or condition.[3]

§ 608. It has been already stated, that in the interpretation of purely personal legacies, Courts of Equity follow the rules of the Spiritual Courts, and in those which are charged on lands, the rules of the Common Law.[4] But, although this is generally true, it is not to be taken for granted, that Courts of Equity do, in all cases, follow the rules of Courts of Common Law, in deciding upon the nature, extent, interpretation, and effect of legacies. There are some cases, in which Courts of Equity act upon principles peculiar to themselves in relation to legacies.[5] But any attempt to

[1] Dig. Lib. 31, tit. 1, l. 77, § 1, cited in Hambrooke *v.* Simmons, 4 Russ. R. 27.

[2] Cod. Lib. 6, tit. 42, l. 9, cited 4 Russ. 27.

[3] See Drury *v.* Smith, 1 P. Will. 404; Blount *v.* Burrow, 4 Bro. Ch. R. 75; Hambrooke *v.* Simmons, 4 Russ. R. 25; Hill *v.* Hill, 8 Mees. & Welsb. 401; 1 Williams on Executors and Administrators, Pt. 2, B. 2, ch. 2, § 4, p. 548, note (*v*), (edit. 1838.)

[4] Ante, § 602; Keily *v.* Monck, 3 Ridgew. Parl. Cas. 243.

[5] See 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, § 4, 5, and notes (*i*) and (*l*);

point them out in a satisfactory manner, would require a general review of the whole doctrine of legacies, a task, which is incompatible with the objects of the present Commentaries.[1]

3 Wooddes. Lect. 59, p. 479, 480, 481 ; Id. 494 ; Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 106 ; Arnald *v.* Arnald, 1 Bro. Ch. R. 403.

[1] The whole subject of legacies is very amply discussed in Mr. Roper's Treatise on Legacies, as newly edited by Mr. White ; in 2 Fonbl. Eq. B. 4, Pt. 1, ch. 1, 2 ; in Jeremy on Eq. Jurisd. B. 1, ch. 1, § 2, p. 104 to 135, and in Wooddeson, Lect. 60, p. 509, &c. The most important topics are the description of the persons, who are to take, when legacies are specific or not ; when they are cumulative or not ; when they lapse, or merge ; when there is an ademption of them ; when an abatement of them ; when conditional ; when personal, or chargeable on land ; when they vest ; when interest is allowed ; and lastly, the marshalling of assets in favor of them.

CHAPTER XI.

CONFUSION OF BOUNDARIES.

§ 609. HAVING disposed of the subject of Administrations and Legacies, we shall next proceed to the consideration of another head of concurrent jurisdiction, arising from the confusion of the boundaries of land, and the confusion or entanglement of other rights and claims of an analogous nature, calling for the interposition of Courts of Equity, in order to restore and ascertain, and fix them.

§ 610. In the first place, in regard to CONFUSION OF BOUNDARIES. The issuing of commissions to ascertain boundaries is certainly a very ancient branch of Equity Jurisdiction.[1] A number of cases of this sort will be found in the earliest of the Chancery Reports. Thus, in Mullineux *v.* Mullineux, in 14th Jac. 1, a commission was awarded, "to set out lands, that lye promiscuously, to be liable for the payment of debts." In Peckering *v.* Kimpton, 5 Car. 1,[2] a commission was awarded, "to set out copyhold lands free from land which lye obscured; if the commissioners cannot sever it, then to set out so much in lieu thereof."

[1] Jeremy on Eq. Jurisd. B. 3, ch. 1, § 3, n. 1, p. 301, 302.

[2] Tothill, R. 39, (edit. 1649.) See also Wake *v.* Conyers, 1 Eden, R. 337, note. 2 White & Tudor's Eq. Lead. Cases, 318, and notes; Marquis of Bute *v.* The Clamorganshire Co. 1 Phillips, Ch. R. 681. See Co. Litt. 169 *a*; Hargrave's note 23, vii.

§ 611. It is not very easy to ascertain with exactness the origin of this jurisdiction.[1] It has been supposed by Lord Northington and Lord Thurlow, that consent was the ground upon which it was originally exercised.[2] There are two writs in the Register concerning the adjustment of controverted boundaries, from one of which, (in the opinion of Sir William Grant,) it is probable that the exercise of this jurisdiction in the Court of Chancery took its commencement.[3] The one is the writ *De Rationabilibus divisis*, which properly lies, where two men have lands in divers towns or hamlets, so that one is seized of the land in one town or hamlet, and the other of the land in the other town or hamlet by himself; and they do not know the boundaries of the towns or hamlets, whereby to ascertain which is the land of one, and which is the land of the other. In such a case, to set the bounds certain, this writ lies for the one against the other.[4] The other writ is *De Perambulatione faciendâ*. This writ is sued out with the assent of both parties, where they are in doubt of the bounds of their lordships or manors, or of their towns. And upon such assent, the writ issues to the sheriff to make the perambulation, and to set out the bounds and limits between them in certainty.[5] And it is added, in Fizherbert, (in which he follows the rule of the Registrum Brevium,) that the perambulation may be made for divers towns, and in divers counties; and the parties ought to come into the Chancery, and there

[1] Ibid.
[2] Speer *v.* Crawter, 2 Meriv. 417.
[3] Ibid.; Regist. Brevium, 157 *b*.
[4] Fitzherb. Nat. Brev. 300 [128.]
[5] Fitzherb. Nat. Brev. 309 [133.]

acknowledge and grant that a perambulation be made betwixt them; and the acknowledgment shall be enrolled in the Chancery, and thereupon a commission or writ shall issue forth.[1]

§ 612. Sir William Grant farther supposes, that the jurisdiction having thus originated in consent, the next step would probably be, to grant the commission on the application of one party, who showed an equitable ground for obtaining it, such as that a tenant, or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise, on such an equitable ground, no objection has ever been made,[2] and it may be added, no just objection can be made.

§ 613. This account of the origin of the Chancery Jurisdiction seems highly probable in itself; but however satisfactory it may seem, it can scarcely be said to afford more than a reasonable conjecture, and is not a conclusive proof, that such was the actual origin. In truth, the recent discoveries made of the actual exercise of Chancery Jurisdiction in early times, as disclosed in the Report of the Parliamentary Commissioners, already referred to in a former part of these Commentaries, are sufficient to teach us to rely with a subdued confidence upon all such conjectural sources of jurisdiction.[3] It is very certain, that in some cases the Court of Chancery has granted commissions, or directed issues, on no other apparent ground, than that the boundaries of manors were in controversy.[4] And Lord Northington seems to

[1] Ibid.; Regis. Brev. 157, and Regula, ibid.

[2] Speer *v.* Crawter, 2 Meriv. 417.

[3] Ante, § 47, 48, and notes, ibid.

[4] Ibid. See Lethulier *v.* Castlemain, 1 Dick. R. 46; S. C. 2 Eq. Abridg. 161; Sel. Cas. Ch. 60; Metcalfe *v.* Beckwith, 2 P. Will. 376.

have assigned a different origin to the jurisdiction from that already suggested, upon one important occasion, at least, namely, that parties originally came into the Court for relief, in cases of confusion of boundaries, under the Equity of preventing multiplicity of suits.[1]

§ 614. The Civil Law was far more provident than ours, upon the subject of boundaries. It considered, that there was a tacit agreement, or duty, between adjacent proprietors, to keep up and preserve the boundaries between their respective estates; and it enabled all persons having an interest to bring a suit to have the boundaries between them settled, and this, whether they were tenants for years, usufructuaries, mortgagees, or other proprietors. The action was called *Actio finium regundorum;* and if the possession was also in dispute, that might be ascertained and fixed in the same suit, and, indeed, was incident to it.[2] Perhaps it might not have been originally unfit for Courts of Equity to have entertained the same general jurisdiction, in cases of confusion of boundaries, upon the ground of enforcing a specific performance of the implied engagement or duty of the Civil Law. Such a broad origin or exercise of the jurisdiction has, however, never been claimed or exercised.

§ 615. But, whatever may have been the origin of this branch of jurisdiction, it is one which has been watched with a good deal of jealousy by Courts of Equity of late years; and there seems no inclination to favor it, unless special grounds are laid to sustain it.

[1] Wake *v.* Conyers, 1 Eden, R. 334; S. C. 1 Cox, R. 360.

[2] See 1 Domat, B. 2, tit. 6, § 1, 2, p. 308, 309; Co. Litt. 169 *a*, Hargrave's note 23; Dig. Lib. 10, tit. 1, l. 1, per tot.

The general rule now adopted is, not to entertain jurisdiction, in cases of confusion of boundaries, upon the ground, that the boundaries are in controversy;[1] but to require that there should be some Equity superinduced by the act of the parties; such as some particular circumstances of fraud; or some confusion, where one person has ploughed too near another; or some gross negligence, omission, or misconduct, on the part of persons whose special duty it is to preserve or perpetuate the boundaries.[2]

§ 616. Where there is an ordinary legal remedy, there is certainly no ground for the interference of Courts of Equity, unless some peculiar Equity supervenes, which a Court of Common Law cannot take notice of or protect. It has been said by Lord Northington, that where there is no legal remedy, it does not therefore follow, that there must be an equitable remedy, unless there is also an equitable right. Where there is a legal right, there must be a legal remedy; and if there is no legal right, in many cases there can be no equitable one.[3] On this account he dismissed a bill to settle the boundaries between manors, it appearing, that there was no dispute as to the right of soil and freehold, on both sides the boundary marks, (which right was admitted by the bill to be in the defendant,) and that the right of seignory alone, (an incorporeal hereditament,) and not that of the soil, was in dispute.

[1] Haskell *v.* Allen, 23 Maine, R. 448; Stewart *v.* Coulter, 4 Rand. 74; Hale *v.* Darter, 5 Humph. 79; Topp *v.* Williams, 7 Humph. 569. But see Lethulier *v.* Castlemain, 1 Dick. R. 46; S. C. 2 Eq. Abridg. 161; Sel. Cas. in Ch. 60.

[2] Wake *v.* Conyers, 1 Eden, R. 331; S. C. 1 Cox, R. 360. See Miller *v.* Warmington, 1 Jac. & Walk. 473; Eden on Injunctions, ch. 16, p. 361, 362.

[3] Ibid.

And his Lordship on this occasion remarked, that "all the cases where the Court has entertained bills for establishing boundaries, have been where the soil itself was in question, or where there might have been a multiplicity of suits."[1]

§ 617. So in a case, where a bill was brought by one parish against another to ascertain the boundaries of the two parishes in making their rates; and a number of houses had been built upon land formerly waste; and it was doubtful to which parish each part of the waste belonged; Lord Thurlow refused to interfere, and observed that the greatest inconvenience might arise from doing so. For, if a commission were granted, and the bounds set out by commissioners, any other parties, on a different ground of dispute, might equally claim another commission. These other commisioners might make a different return, and so, in place of settling differences, endless confusion would be created.[2] In another report of the same case, he is reported to have said, If he should entertain the bill, and direct an issue in such a case as that, he did not see what case would be peculiar to the Courts of Law, and he did not know how to extract a rule from the Mayor of York *v.* Pilkington, (1 Atk. R. 282.)[3] Where there was a common right

[1] Ibid.

[2] St. Luke's *v.* Leonard's Parish, or Warring *v.* Hotham, cited by Ch. Baron McDonald, in Atkins *v.* Hatton, 2 Anstr. R. 395; S. C. 2 Dick. 550.

[3] Warring *v.* Hotham, 1 Bro. Ch. R. 40, and Mr. Belt's note (2). The case of the Mayor of York *v.* Pilkington, 1 Atk, 282, was a bill brought to quiet the plaintiff's in a right of fishery in the river Ouse, of which they claimed the sole fishery against the defendants, who (as was suggested in the bill) claimed *several* rights, either as lords of manors, or as occupiers of the adjacent lands; and also for a discovery and account of the fish taken. The defendants demurred to the bill, as being matter cogni-

to be tried, such a proceeding was to be understood. The boundary between the two jurisdictions was apparent. That is the case, where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one. But in the case before him, he saw no common right, which the parishoners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor-laws.[1] The ground of dismissing the bill seems, from these very imperfect statements of the case, to have been, first, that the proper remedy was at law; and, secondly, that no Equity was superinduced, for it would not even suppress multiplicity of suits.

§ 618. In Atkins *v.* Hatton, (2 Anstr. R. 386,) the Court refused to entertain a bill brought by the rector of a parish principally for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe. The Court said, "The plaintiff here calls upon the Court to grant a commission to ascertain the boundaries of the parish, upon the presumption that all the lands which shall be found within those boundaries, would be tithable to him. That is, indeed, a *prima facie* inference; but by no means conclusive. And there is no instance of the Court ever granting a commission, in order to attain a remote consequential advantage. It is a jurisdiction which Courts of Equity have always been

zable at law only. Lord Hardwicke at first sustained the demurrer, but afterwards overruled it. Lord Thurlow disapproved of this final decision; and to this, a part of his reasoning, in 1 Bro. Ch. R. 40, is addressed.

[1] Warring *v.* Hotham, or St. Luke's *v.* St. Leonard's Parish, 1 Bro. Ch. R. 40; S. C. 2 Dick. 550. See Metcalf *v.* Beckwith, 2 P. Will. 376.

very cautious of exercising." It is observable, that no special Equity was here set up. But the party desired the commission solely upon the ground of founding a possible right against some persons for tithes, upon the ground, that the land which they occupied was intra-parochial and tithable. This was properly a matter at law, to be ascertained by a special suit against every owner or occupant of land severally, and not against them jointly, in a bill to ascertain boundaries.

§ 619. These cases are sufficient to show, that the existence of a controverted boundary by no means constitutes a sufficient ground for the interposition of Courts of Equity, to ascertain and fix that boundary. Between independent proprietors such cases would be left to the proper redress at law.[1] It is, therefore, necessary to maintain such a bill, (as has been already stated,) that some peculiar Equity should be superinduced.[2] In other words, there must be some equitable ground attaching itself to the controversy. And we may, therefore, inquire, what will constitute such a ground? This has been in part already suggested. In the first place, it may be stated, that if the confusion of boundaries has been occasioned by fraud, that alone will constitute a sufficient ground for the interference of the Court.[3] And if the fraud is established, the Court will by commission ascertain the boundaries, if practicable; and, if not practicable, will do justice

[1] Speer *v.* Crawter, 2 Meriv. R. 410, 417; Miller *v.* Warmington, 1 Jack. & Walk. 472; Loker *v.* Rolle, 3 Ves. 4.

[2] Wake *v.* Conyers, 1 Eden, R. 331; S. C. 1 Cox, R. 360; Speer *v.* Crawter, 2 Meriv. R. 417, 418.

[3] This is understood to have been the ground of the decision of the House of Lords, in Rouse *v.* Barker, 3 Bro. Ch. Rep. 180, reversing the

between the parties by assigning reasonable boundaries, or setting out lands of equal value.[1]

§ 620. In the next place, it will be a sufficient ground for the exercise of jurisdiction, that there is a relation between the parties, which makes it the duty of one of them to preserve and protect the boundaries; and that, by his negligence or misconduct, the confusion of boundaries has arisen. Thus, if, through the default of a tenant, or a copy-holder, (who is under an implied obligation to preserve them,) there arises a confusion of boundaries, the Court will interfere, as against such tenant or copy-holder, to ascertain and fix the boundaries.[2] But, even in such cases, it is further indispensable to aver, and to establish by suitable proofs, that the boundaries, without such assistance cannot be found.[3] And the relation of the parties, entitling them to the redress, must also be clearly stated; for, where the parties claim by adverse titles, without any superinduced Equity, we have already seen, that the remedy is purely at law.[4]

§ 621. In the next place, a bill in Equity will lie to ascertain and fix boundaries, when it will prevent a mul-

decree of the Exchequer in the same cause. See Atkins v. Hatton, 2 Anstruth. R. 396.

[1] Speer v. Crawter, 2 Meriv. R. 418; Duke of Leeds v. Earl of Strafford, 4 Ves. 181; Grierson v. Eyre, 9 Ves. 345; Attorney-General v. Fullerton, 2 Ves. & Beam. 263; Willis v. Parkinson, 2 Meriv. R. 507. The common form of a decree for a commission in a case of this nature, will be found in Willis v. Parkinson, 2 Meriv. R. 506, 509; Duke of Leeds v. Strafford, 4 Ves. 186.

[2] Ibid; Ashton v. Lord Exeter, 6 Ves. 293; Miller v. Warmington, 1 Jac. & Walk. 472; Attorney-General v. Fullerton, 2 Ves. & Beam. 263; Speer v. Crawter, 17 Ves. 216.

[3] Miller v. Warmington, 1 Jac. & Walk. 472.

[4] Ibid.

tiplicity of suits. This is an old head of Equity Jurisdiction; and it has been very properly applied to cases of boundaries.[1] Indeed, in many cases of this nature, as, for instance, where the right affects a large number of persons, such as a common right in lands, or in a waste, claimed by parishioners, commoners, and others, where the boundaries have become confused by lapse of time, accident, or mistake, the appropriate remedy to adjust such conflicting claims, and to prevent expensive and interminable litigation, seems properly to be in Equity.[2] And it will not constitute any objection to a bill to settle the boundaries between two estates, that they are situate in a foreign country, if, in other respects, the bill is, from its frame, properly maintainable.[3]

§ 622. There are cases of an analogous nature, (which constitute the second class of cases, arising from confusion or entanglement of other rights and claims than to lands,) where a mischief, otherwise irremediable, arising from confusion of boundaries, has been redressed in Courts of Equity. Thus, where a rent is chargeable on lands, and the remedy by distress is, by confusion of boundaries, or otherwise, become impracticable; the jurisdiction of Equity has been

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1 Wake *v.* Conyers, 1 Eden, 331; S. C. 1 Cox, R. 360; Waring *v.* Hotham, 1 Bro. Ch. R. 40; S. C. cited 2 Anstruth. R. 395; Bouverie *v.* Prentice, 1 Bro. Ch. R. 200; Mayor of York *v.* Pilkington, 1 Atk. 282, 284. See Whaley *v.* Dawson, 2 Sch. & Lefr. 370, 371.

2 See ibid.; Marquis of Bute *v.* The Clamorganshire Co. 1 Phillips, Ch. R 681.

3 Penn *v.* Lord Baltimore, 1 Ves. R. 444; Pike *v.* Hoare, 2 Eden, R. 182; Bayley *v.* Edwards, 3 Swanst. R. 703; Tulloch *v.* Hartley, 1 Younge & Coll. New Cas. in Chan. 114.

most beneficially exerted to adjust the rights and settle the claims of the parties.[1]

§ 623. Other illustrations will present themselves more appropriately under other heads, in the course of these Commentaries. One instance, however, may be mentioned, in which Courts of Equity administer the most wholesome moral justice, following out the principles of law; and that is, where an agent, by fraud or gross negligence,[2] has confounded his own property with that of his principal, so that they are not distinguishable. In such a case, the whole will be treated in Equity as belonging to the principal, so far as it is incapable of being distinguished.[3]

[1] Bowman *v.* Yeat, cited 1 Cas. Ch. 145, 146; Duke of Leeds *v.* Powell, 1 Ves. R. 171, and Belt's Supp. 98; Bouverie *v.* Prentice, 1 Bro Ch. R. 200; North *v.* Earl of Strafford, 3 P. Will. 148, 149; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 518; Mitf. Pl. Eq. by Jeremy, 117; 1 Fonbl. Eq. B. 1, ch. 3, § 3, and note (*g*). Post, § 689.

[2] [Quære, whether negligence merely, of the agent, in permitting the confusion, will forfeit his property in his portion. See Pratt *v.* Bryant, 20 Verm. R. 333.]

[3] Lupton *v.* White, 16 Ves. 432; Panton *v.* Panton, cited ibid; Chedwort *v.* Edwards, 8 Ves. 46; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 108; 2 Black. Comm. 405; Story on Bailm. § 40; Ante, § 468; Bryant *v.* Ware, 30 Maine, 295, 237, 370; 2 Black. Comm. 405; 4 Burr. R. 2349; Colburn *v.* Simms, 2 Hare, R. 554; cited at large, Post, § 933, note.

CHAPTER XII.

DOWER.

§ 624. ANOTHER head of concurrent equitable jurisdiction is in matters of DOWER. As dower is a strictly legal right, it might seem, at first view, that the proper remedy belonged to Courts of Common Law. The jurisdiction of Courts of Equity in matters of dower, for the purpose of assisting the widow by a discovery of lands or title-deeds, or for the removing of impediments to her rendering her legal title available at law, has never been doubted.[1] And indeed, it is extremely difficult to perceive any just ground upon which to rest an objection to it, which would not apply with equal force to the remedial justice of Courts of Equity, in all other cases of legal rights in a similar predicament. But the question has been made, how far Courts of Equity should entertain general jurisdiction to give general relief in those cases, where there appeared to be no obstacle to her legal remedy.[2] Upon this question there has, in former times, been no inconsiderable discussion, and some diversity of judgment. But the result of the various decisions upon this subject is, that Courts of Equity will now entertain a general concurrent jurisdiction with

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

[2] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Huddlestone *v.* Huddlestone, 1 Ch. R. 38; Park on Dower, ch. 15, p. 317.

Courts of Law in the assignment of dower in all cases.[1] The ground most commonly suggested for this result is, that the widow is often much embarrassed, in proceedings upon a writ of dower at the Common Law, to discover the titles of her deceased husband to the estates, out of which she claims her dower (the title-deeds being in the hands of heirs, devisees, or trustees); to ascertain the comparative value of different estates; and to obtain a fair assignment of her third part.[2] In such cases, where the title of the widow to her dower is not disputed, the Court proceeds directly to the assignment of dower; but, if the title is disputed, it is first required to be established by an issue at law, or otherwise.[3]

§ 625. There are some cases, in which the remedy for dower in Equity seems indispensable. At law, if the tenant dies after judgment, and before damages are assessed, the widow loses her damages. And so, if the widow herself dies before the damages are assessed, her personal representative cannot claim any. But a Court of Equity will, in such cases, entertain a bill for relief; and decree an account of rents and profits, against the respective representatives of the several persons, who may have been in possession of the estate

[1] Curtis *v.* Curtis, 2 Bro. Ch. R. 620; Mundy *v.* Mundy, 2 Ves. jr., 122; S. C. 4 Bro. Ch. R. 294; Blain *v.* Harrison, 11 Ill. R. 388.—I am aware that Mr. Park, in his excellent Treatise on Dower, doubts, if the doctrine is maintainable to this full extent. But, notwithstanding his doubts, it appears to me the just result of the authorities, and maintainable upon principle. Indeed, Mr. Park seems to admit, that where a discovery or account is wanted, there seems no just objection to the jurisdiction. Park on Dower, ch. 15, pp. 317, 320, 325, 326, 329, 330; Strickland *v.* Strickland, 6 Beav. R. 77, 81.

[2] Mitf. Pl. Eq. 121, 122, 123, by Jeremy, and note (*a*); Jeremy on Eq. Jurisd. B. 3, Pt. 2, ch. 5, p. 508, 509.

[3] Ibid; Park on Dower, ch. 15, p. 329.

since the death of the husband; provided, at the time of filing the bill, the legal right to damages is not gone.[1]

§ 626. Upon principle, there would not seem to be any real difficulty in maintaining the concurrent jurisdiction in Courts of Equity in all cases of dower; for a case can scarcely be suppcsed, in which the widow may not want, either a discovery of the title-deeds, or of dowable lands; or some impediment to her recovery at law removed; or an account of mesne profits before the assignment of dower; or a more full ascertainment of the relative values of the dowable lands; and, for any of these purposes, (independent of cases of accident, mistake, or fraud, or other occasional equities,) there seems to be a positive necessity for the assistance of a Court of Equity.[2] And, if a Court of Equity has once a just possession of the cause in point of jurisdiction, there seems to be no reason, why it should stop short of giving full relief, instead of turning the dowress round to her ultimate remedy at law, which is often dilatory, and always expensive.[3] Dower is favored, as well in law, as in Equity.[4] And the mere circumstance, that a

[1] Park on Dower, ch. 15, p. 330; Id. 309; Curtis *v.* Curtis, 2 Bro. Ch. R. 632; Dormer *v.* Fortescue, 3 Atk. 130; Mordaunt *v.* Thorold, 3 Lev. R. 275; 1 Salk. 252.

[2] The action of dower is now, in consequence of the jurisdiction in Equity being established, less frequently resorted to at law, than in former times. And the Parliamentary Commissioners, in their Report, (2 Report of Common Law, p. 7, 1830,) say: The necessity for a discovery to ascertain the state of the legal title, before a widow can safely resolve to commence an action against any person as tenant of the freehold, and the convenience of a commission for setting out her dower under the authority of a Court of Equity, generally make it expedient that a suit in Equity should be instituted.'

[3] See Park on Dower, ch. 15, p. 318.

[4] Com. Dig. Chancery, 3 E. 1, 2. See Blain *v.* Harrison, 11 Ill. R. 388.

discovery of any sort may be wanted to enforce the claim, would, under such circumstances, seem to furnish a sufficient reason why the jurisdiction for discovery should carry the jurisdiction for relief.[1]

§ 627. Lord Eldon has put this matter in a strong light. After having remarked, that he did not know any case, in which an heir had claimed, merely as heir, an account (of mesne profits), without stating some impediment to his recovery at law; as, that the defendant has the title-deeds necessary to maintain his title; that terms are in the way of his recovery at law; or other legal impediments, which do, or may probably prevent it; upon which probability, or upon the fact, the Court might found its jurisdiction; he proceeded to say; — "The case of the dowress is upon a principle, somewhat, and not entirely, analogous to that of the heir. An indulgence has been allowed to her case, upon the great difficulty of determining *a priori*, whether she could recover at law, ignorant of all the circumstances; and the person, against whom she seeks relief, &c., having in his possession all the information necessary to establish her rights. Therefore, it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed."[2]

[1] See Dormer *v.* Fortescue, 3 Atk. 130, 131; Moor *v.* Black, Cas. Temp. Talb. 126; Herbert *v.* Wren, 7 Cranch, 370, 376; Curtis *v.* Curtis, 2 Bro. Ch. R. 620; Mundy *v.* Mundy, 2 Ves. jr., 122; S. C. 4 Bro. Ch. 294; Graham *v.* Graham, 1 Ves. 262; D'Arcy *v.* Blake, 2 Sch. & Lefr. 389, 390; Powell *v.* The Monson Manuf. Co. 3 Mason, R. 347.

[2] Pulteney *v.* Warren, 6 Ves. 89. See Co. Litt. 208, Butler's note (105,) as to dower in the case of a mortgage for a term of years. Strickland *v.* Strickland, 6 Beav. R. 77, 80. In this case Lord Langdale said: "It

§ 628. But the propriety of maintaining a general jurisdiction in Equity, in matters of dower, is still more fully vindicated in a most elaborate opinion of Lord Alvanley, when Master of the Rolls, in a case, which now constitutes the polar star of the doctrine. After adverting to the fact, that dower is a mere legal demand, and the widow's remedy is at law, he said, "But then, the question comes, Whether the widow cannot come, either for a discovery of those facts, which may enable her to proceed at law; and, on an allegation of impediments thrown in her way in her proceedings at law, this Court has not a right to assume a jurisdiction, to the extent of giving her relief for her dower; and, if the alleged facts are not positively denied, to give her the full assistance of the Court, she being in conscience, as well as at law, entitled to her dower." He then proceeded to state the reasons why the widow should have the assistance of the Court by relief, as well as by recovery; insisting that the case of the widow is not distinguishable from that of an infant, where the relief would clearly be granted; and that it would be unconscientious to turn her round to a suit at law, for the recovery of her dower, which must be supposed to be

was argued, that if difficulties are shown to exist, and if, from the nature of the case, it appears to be in the power of the defendant to raise those difficulties, this Court will not only restrain the defendant from raising the difficulties, but will assume the whole jurisdiction over the case; and if this were so, the plaintiff might be entitled to relief on this bill. But there is no such general rule; there are, indeed, some particular cases of legal right, such as dower and partition, in which the Court has assumed a general jurisdiction, probably in consequence of the difficulties to which the plaintiff would be subjected in seeking to obtain complete justice at law; but, in other cases, the plaintiff is to show what the difficulties are, and how they impede him in a manner contrary to equity, and his bill ought to pray to be relieved from them."

necessary for her to live upon, when she has been compelled to resort to Equity for a discovery. And he finally concluded by saying, that the widow labors under so many disadvantages at law, that she is fully entitled to every assistance, that this Court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief, when the right is ascertained.[1]

[1] Curtis *v.* Curtis, 2 Bro. Ch. R. 620, 630 to 634. — The judgment of the Master of the Rolls contains so masterly a view of the doctrine, that I venture to transcribe the material passages, as they cannot be abridged without injury to their force. — "Dower, therefore, is a mere legal demand, and the widow's remedy is *primâ facie* at law. But, then, the question comes, Whether the widow cannot come, either for a discovery of those facts which may enable her to proceed at law, and on an allegation of impediments thrown in her way in her proceedings at law, this Court has not a right to assume a jurisdiction, to the extent of giving her relief for her dower, and if the alleged facts are not positively denied, to give her the full assistance of this Court, she being, in conscience as well as at law, entitled to her dower. Her remedy at law is a writ of dower. Generally there are no damages in real actions; but so favorable was the law to this particular action, that it provided a special relief for the widow, by giving her damages. If the widow was disturbed in her quarantine, she had a particular writ penned for her relief. As to dower, the widow, at first, was only entitled to have an assignment of the land by metes and bounds. Then came the Statute of Merton, which showed particular anxiety for the relief of widows. And it is curious to see that the attempt now, is to drive the widow to that remedy, as the least advantageous, though it is very evident, the statute was meant to give her an additional remedy. The deforcers of dower are (by that statute) to be in mercy, or fined at the pleasure of the king, which, in those days, was a very serious thing, and was meant as a real punishment to deforcers. I own, I think it an odd construction of this statute, that the damages given by it are to be considered strictly as damages, that is, as vindictive damages in the breast of a jury, and not capable of ascertainment by the Court, and that, therefore, they are to die with the person. However, so it has been determined. As to what is said in Sayer's Law of Damages, that a widow shall have no damages, when her dower is assigned to her in Chancery, it certainly is a mistake of the meaning of Co. Litt. 33 *a*; for Coke is there speaking of the writ *de Dote assignandâ* issued by the Court of Chancery, and

§ 629. Dower, as has been already suggested, is highly favored in Equity. And, as was said by the

not a decree of a Court of Equity. In Fitzherbert's *Natura Brevium*, the nature of the writ *de Dote assignandâ* appears very clear; and on this there are no damages, because there is no deforcement of the widow, who is put to no trouble, but has a summary remedy provided for her. Now, as to the cases which have been cited, Hutton *v.* Simpson, 2 Vern. 722, does not seem to bear much upon this case. Tilley *v.* Bridges, Prec. Ch. 252, is also reported in 2 Vern. 519, and I have some doubt about the authority of that case, for it is more particularly stated in Vernon, than in Prec. Ch.; and yet, what is said in Vernon, as to the injunction not preventing the entry, certainly cannot be right. Duke of Bolton *v.* Deane, Norton *v.* Frecker, and other cases, have been mentioned, to show, that there must be some fraud to give this court a jurisdiction, and that in the simple case of a widow claiming her dower, no such jurisdiction exists. Dormer *v.* Fortescue is also brought to show, that there must either be an infant concerned, or some particular circumstances in the case, to entitle this Court to proceed. Now, it seems difficult to distinguish the two cases of the infant and the widow. The principle, in the case of the infant is, that he is thought not conusant of his rights at law sufficiently to enable him to proceed there; and therefore, the Court of Equity will give him all the relief he could have at law, and something more; for, on a bill by an infant for an account, he will get the mesne profits, which would certainly be gone at law by the death of the party. I argue in the same manner for the widow. She comes here and says, 'The law gives me dower out of the estates of my husband and the mesne profits from his death; I do not know how to proceed; for if there should turn out to be any mortgage, or term of years in my way, then I must pay the costs. The defendant has all the title-deeds in his hands, and knows what the estates are; his conscience is affected; and yet, instead of putting me in possession of my rights, he turns me out of doors, and keeps all the title-deeds.' Now, I think this argument is a strong one, on the subject of fraud and concealment on the part of the heir, in not informing the widow of all that is necessary to enable her to proceed safely at law. If, then, she comes here for a discovery of these matters, which the heir withholds from her, she shall have her complete relief in this Court. If you deny her right to dower, the question must be tried at law; but, when the fact is ascertained, she shall have her relief here. It must be supposed, the dowress has nothing to live upon but her dower, and the mesne profits are her subsistence from the time of her husband's death; and the course of this Court seems, therefore, to have been to assign her dower, and universally to give her an account from the death of

Master of the Rolls, (Sir Thomas Trevor,) on one occasion, the right that a dowress has to her dower, is not

her husband. I admit she has no costs, where the heir has thrown no difficulties in her way; and, if the heir admits the widow's case, he is safe. I wished to find, if I could, any instance of the widow's being turned round on such a case as this; but, verily, I believe there is no such instance. And, indeed, the case of Moor *v.* Black, (Cas. Temp. Talb. 126,) is pretty clear to show, that Lord Talbot thought the widow's claim to be rightly made here; for he overruled the demurrer in that case on both points. It shows that the difficulty, under which a widow labors, is a reason for her coming here. Delver *v.* Hunter does not govern this case; for there the widow had recovered possession. Lucas *v.* Calcraft has also been mentioned, as showing that this Court would give no other relief as to dower, than such as the law would give the widow, and that the Lord Chancellor had refused to give costs in that case, because no costs were given at law. But, in that case, the heir had thrown no impediment in the widow's way, and, therefore, there were no costs on either side. Now, taking it for granted, that the widow, coming after the death of the heir, would not be entitled to her mesne profits, it by no means follows, that when the widow is right in this Court, but the heir happens to die before she has fully established her right, she is not entitled to her mesne profits; for unquestionably, if the heir, instead of contesting the widow's right, had admitted it, she would have been entitled to her decree for mesne profits, and his having thrown an impediment in her way shall not make the difference. At the same time, I must again admit that the widow's right at law is gone by the death of the party. Mordant *v.* Thorold is principally relied upon as to this point. It has been cited from Salkeld, tit. *Dower;* but it is also reported in 3 Lev. 275, and the result is stated differently in the latter book, though the state of the case seems copied from the other; for in Levinz it is said the Court inclined to that opinion, but it being a new case, they would advise, and no decision was given; and it is to be observed that Levinz was himself counsel in that case. Aleworth *v.* Roberts, 1 Lev. 38, is mentioned in the former case; there the action was against the heir of the heir and the alienee of the heir, and not against the heir's executor; and the ground of that case was, that neither the heir nor the alienee were deforcers, and the damages were not a lien upon the land; and, then the distinction is taken between the cases of tithes and dower; that, in the first case the damages were certain; in dower, uncertain. But surely, in common sense, they are equally certain. If it were not for the case of Mordant *v.* Thorold, I really should have doubted much the construction of this statute. I should have thought that the damages given by the statute were certain, and were not arbitrary, uncertain damages, to be ascertained by the discretion

only a legal right, and so adjudged at law; but it is also a moral right, to be provided for, and have a maintenance and sustenance out of her husband's estate to

of a jury. However, it does seem a settled point at law, and that, at law the widow could not have recovered against the executor of Thomas Curtis. This being so, it is insisted, on the part of the widow, that still she has a right to come here for full relief, and that she ought to be in the same situation, as if the heir had admitted her claim at first, (and, to be sure, in this case, the heir has given every opposition to her claim that he possibly could); and that, in this and many other cases, this Court gives a further remedy than the law will do. It is true, where the law gives neither right nor remedy, however hard it may be, Equity cannot assist. So in the case of damages for a personal injury, which arises *ex delicto*, and not *ex contractu*, they are gone with the person. But it is not so clear in the case of a demand, the recovery of which has been prevented by a difficulty, unconscientiously thrown in the way of another person. There, Equity will give relief, and the relief it gives is beyond that which the party could obtain at law. It is the practice in Equity, that bond-creditors, coming for a distribution of assets, shall have an account of rents and profits, which they could not have at law. And yet the same argument might be used against that additional relief, as has been used in this case. The law gives the creditor only the land to hold, until he is satisfied. Equity goes further and says, if the remedy at law is not sufficient, we will sell the inheritance of the estate, and if that will not do, we will direct an account of rents and profits against the heir. Dormer *v.* Fortescue certainly supports these ideas very strongly, though, I am sure, Lord Hardwicke's words must have been misconceived by Mr. Atkyns, as to what he was supposed to have said in respect of the time, from which the statute of 9 Henry III. gives the widow damages. But as far as one can collect Lord Hardwicke's sentiments from that case, he thought this Court would expect the widow to establish her title at law, but, she having so done, would give her relief here as to the mesne profits. That is saying, Let the widow bring her action at law, out of form, for the purpose of determining her title to dower, and, when she has done that we will give her an adequate remedy. Here, I confess, I agree most fully in thinking, that the widow labors under so many disadvantages at law, from the embarrassments of trust terms, &c., that she is fully entitled to every assistance that this Court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief, when the right is ascertained." Curtis *v.* Curtis, 2 Bro. Ch. R. 630 to 634; Strickland *v.* Strickland, 6 Beav. R. 77.

live upon. She is, therefore, in the care of the law, and a favorite of the law. And upon this moral law is the Law of England founded, as to the right of Dower.[1] So much is this the case, that the widow will be aided in Equity for her dower against a term of years, which attends the inheritance, if it is not the case of a purchaser against whom she claims.[2] And if she has recovered her dower against an heir, who is an infant, and there is a term to protect the inheritance, which by the neglect of his guardian, is not pleaded, the term will not be allowed in Equity to be set up against her.[3]

§ 630. Indeed, so highly favored is dower, that a bill for a discovery and relief has been maintained, even against a purchaser for a valuable consideration without notice, who is, perhaps, generally as much favored as any one in Courts of Equity.[4] The ground of maintaining the bill in such a case is, that the suit for dower is upon a legal title, and not upon a mere equitable claim to which only the plea of a purchase for a valuable consideration has been supposed properly to apply.[5] This

[1] Dudley & Ward *v.* Dudley, Prec. Ch. 244; Banks *v.* Sutton, 2 P. Will. 703, 704. See Co. Litt. 208, Butler's note (105), when the widow is entitled to dower in case of a mortgage of the estate for years.

[2] Com. Dig. Chancery, 3 E. 1; Radnor *v.* Vandebendy, 1 Vern. R. 356; S. C. 2 Ch. Cas. 172; Prec. Ch. 65; 1 Eq. Abridg. 219; Dudley *v.* Dudley, 1 Eq. Abridg. 219; D'Arcy *v.* Blake, 2 Sch. & Lefr. 389, 390; Mole *v.* Smith, 1 Jac. 496, 497.

[3] Com. Dig. Chancery, 3 E. 1; Wray *v.* Williams, Prec. Ch. 151; S. C. 1 Eq. Abridg. 219; 1 P. Will. 137; 2 Vern. 378, and Mr. Cox's note; Dudley & Ward *v.* Dudley, Prec. Ch. 241; Banks *v.* Sutton, 2 P. Will. 706, 707, 708; D'Arcy *v.* Blake, 2 Sch. & Lefr. 389, 390; Swannock *v.* Lyford, Ambl. R. 6, 7; Hitchins *v.* Hitchins, 2 Freem. 242.

[4] Ante, § 61 *c*, 108, 139, 163, 381, 409, 434, 436.

[5] Williams *v.* Lambe, 3 Bro. Ch. R. 264. In Collins *v.* Archer, 1 Russ. & Mylne, 284, Sir John Leach, following the case of Williams *v.* Lambe, held, that a purchaser for a valuable consideration without notice,

decision has been often found fault with, and, in some cases, the doctrine of it denied. It has, however, been vindicated with great apparent force, upon the following reasoning. It is admitted, that dower is a mere legal right; and that a Court of Equity, in assuming a concurrent jurisdiction with Courts of Law upon the subject, professedly acts upon the legal right;[1] for dower does not attach upon an equitable estate. In so acting, the Court should proceed in analogy to the law, where such a plea, of a purchase for a valuable consideration without notice, would not be looked at; and, therefore, as an equitable plea, it should also be inadmissible. But this analogy will not hold, where the widow applies for equitable relief, as, for the removal of terms out of her way, or for a discovery. In the latter cases, the equitable plea, of a purchase for a valuable consideration without notice, cannot be resisted. In the former case, the widow, proceeding upon the concurrent jurisdiction of the Court, merely enforces a right, which the defendant cannot at law resist by such a mode of defence. In the latter case, she applies to the Equity of the Court to take away from him a defence, which at law would protect him against her demand.[2]

§ 631. Other learned minds have, however, arrived at a different conclusion; and have insisted, that, upon

had no defence in Equity against a plaintiff relying upon a legal title. But in Payne *v.* Compton, 2 Younge & Coll. 457, 461, Lord Abinger seems to have thought, that such a purchaser would be protected in Equity against any claim by the owner of the legal estate. Neither of these cases was a claim of dower by the plaintiff.

[1] See Blain *v.* Harrison, 11 Illinois, R. 388.

[2] 1 Roper on Husband and Wife, 446, 447; Ante, § 57 *a*, 410, note, § 434, 436; Williams *v.* Lambe, 3 Bro. Ch. R. 264; Collins *v.* Archer, 1 Russ. &. Mylne, R. 284.

principle, the plea of a purchase for a valuable consideration without notice, is a good plea in all cases, against a legal, as well as against an equitable claim; and that dower constitutes no just exception from the doctrine. They put themselves upon the general principle of conscience and Equity, upon which such a plea must always stand; that such a purchaser has an equal right to protection and support, as any other claimant; and that he has a right to say, that having *bona fide* and honestly paid his money, no person has a right to require him to discover any facts, which shall show any infirmity in his title. The general correctness of the argument cannot be doubted; and the only recognized exception seems to be that of dower, if that can be deemed a fixed exception.[1]

§ 632. Generally speaking, in America, fewer cases

[1] The authorities are both ways. The case of Williams *v.* Lambe, 3 Bro. Ch. R. 264; Collins *v.* Archer, 1 Russ. & Mylne, 284; and Rogers *v.* Scale, 2 Freem. R. 84, are in favor of the doctrine that the plea is not good against a legal title. Against it is the Decision in Burlace *v.* Cooke, 2 Freeman, R. 24; Parker *v.* Blythmore, 2 Eq. Abridg. 79, Pl. 1; Jerrard *v.* Saunders, 2 Ves. jr., 454, and Payne *v.* Compton, 2 Younge & Coll. 457, 461; Blain *v.* Harrison, 11 Illinois, R. 384; Ante, § 630, note (5). Mr. Sugden, in a very late edition of his work on Vendors and Purchasers, ch. 18, p. 762, 763, (1826,) maintains, that the authorities in favor of the sufficiency of the plea against a legal title preponderate; and that, therefore, we may venture to assert, that it will protect the purchaser against a legal, as well as against an equitable claim. On the other hand, Mr. Beames, Mr. Belt, and Mr. Roper maintain the opposite doctrine. Beam. Pl. Eq. 234, 245; 3 Bro. Ch. R. 264, Belt's note (1); 1 Roper on Husband and Wife, 446, 447. See also Medlicott *v.* O'Donnell, 1 Ball & Beatt. 171; Mitford, Pl. Eq. 274, by Jeremy, and note (*d*); 2 Fonbl. Eq. B. 2, ch. 6, § 2, note (*h*); 1 Fonbl. Eq. B. 1, ch. 4, § 25, and note. In a case of such conflict of learned opinions, a commentator's duty is best performed by leaving the authorities for the reader's own judgment. See Park on Dower, ch. 15, p. 327, 328, and the Reporter's note to 1 Russ. & Mylne, 289, n.

occur in regard to dower, in which the aid of a Court of Equity is wanted, than in England, from the greater simplicity of our titles, and the rareness of family settlements, and the general distribution of property among all the descendants, in equal or in nearly equal proportions. Still, however, cases do occur, in which a resort to Equity is found to be highly convenient, and sometimes indispensable. Thus, for instance, if the lands, of which dower is sought, are undivided, the husband being a tenant in common, and a partition, or an account, or a discovery, is necessary, the remedy in Equity is peculiarly appropriate and easy.[1] So, where the lands are in the hands of various purchasers; or their relative values are not easily ascertainable; as, for instance, if they have become the site of a flourishing manufacturing establishment; or if the right is affected with numerous or conflicting equities; [as where mortgages exist, in which the widow has released dower][2] in such cases the jurisdiction of a Court of Equity is, perhaps, the only adequate remedy.[3]

[1] Herbert *v.* Wren, 7 Cranch, 370, 376.

[2] Gibson *v.* Crehore, 5 Pick. 146; Messiter *v.* Wright, 16 Pick. 151; Smith *v.* Eustis, 7 Greenl. R. (Bennett's Ed.) 41.

[3] Powell *v.* Monson Manufacturing Company, 3 Mason, 347; Id. 459; Swaine *v.* Perrine, 5 Johns. Ch. R. 482; Badgley *v.* Bruce, 4 Paige, Ch. R. 98.

CHAPTER XIII.

MARSHALLING OF SECURITIES.

§ 633. ANOTHER head of concurrent jurisdiction, in Courts of Equity, is that of MARSHALLING SECURITIES.[1] We have already had occasion, in another place, to consider the topic of marshalling assets in cases of administration, to which the present bears a very close analogy; and also the doctrine of apportionment and contribution between sureties, to which it also has a near relation. The general principle is, that, if one party has a lien on, or interest in, two funds, for a debt, and another party has a lien on, or interest in one only of the funds, for another debt, the latter has a right in Equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties,[2] whenever it will

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[1] See Aldrich *v.* Cooper, 8 Ves. 394; 2 White & Tudor's Eq. Lead. Cases, 49, and notes; Eden on Injunct. ch. 2, p. 38, 39, 40; Ante, § 499, 558, 559, 560; Post, § 662.

[2] Lanoy *v.* Duke of Athol, 2 Atk. 446; Aldrich *v.* Cooper, 8 Ves. 388, 395, 396; Ex parte Kendall, 17 Ves. 520; Trimmer *v.* Bayne, 9 Ves. 209; Cheeseborough *v.* Millard, 1 Johns. Ch. 413; Averall *v.* Wade, Lloyd & Goold, R. 252; Gwynne *v.* Edwards, 2 Russ. R. 289; Cradock *v.* Piper, 15 Sim. 301; Attorney-General *v.* Tyndall, Ambler, R. 614; Selby *v.* Selby, 4 Russ. 336, 341; Trimmer *v.* Bayne, 9 Ves. 209; Greenwood *v.* Taylor, 1 Russ. & Mylne, 185; 2 Fonbl. Eq. B. 3, ch. 2, § 6; Ante, § 557, 558, 559, 560; Post, § 642; Wiggin *v.* Dorr, 3 Sumner, R. 410, 414.

not trench upon the rights, or operate to the prejudice, of the party entitled to the double fund. Thus, a mortgagee, who has two funds, as against the other specialty creditors, who have but one fund, will, in the case of the death of the mortgagor and the administration of his assets, be compelled to resort first to the mortgage security; and will be allowed to claim against the common fund only what the mortgage, on a sale consented to by him, is deficient to pay.[1] So, if A. has a mortgage upon two different estates for the same debt, and B. has a mortgage upon one only of the estates for another debt, B. has a right to throw A., in the first instance, for satisfaction upon the security, which he, B., cannot touch, at least, where it will not prejudice A.'s rights, or improperly control his remedies.[2] The reason is obvious, and has been already stated; for by compelling A., under such circumstances, to take satisfaction out of one of the funds, no injustice is done to him in point of security or payment. But it is the only way by which B. can receive payment. And natural justice requires, that one man should not be permitted, from wantonness, or caprice, or rashness, to do an injury to another.[3] In

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1 Greenwood *v.* Taylor, 1 Russ. & Mylne, 185, 187.

2 Ibid.; Ante, § 499, 558, 559, 560; Barnes *v.* Rackster, 1 Younge & Coll. New. R. 401; The York & Jersey Steam &c. Company *v.* Associates of the Jersey Company, Hopkins, Ch. R. 460; Post, § 642; Conrad *v.* Harrison, 3 Leigh, R. 532.

3 Lord Chancellor Sugden, in Averall *v.* Wade, (Lloyd & Goold's Rep. 255,) expressed an opinion which may be thought to imply a doubt, whether the doctrine did apply to the case of two mortgages. His language was: "The general doctrine is this. Where one creditor has a demand against two estates, and another a demand against one only, the latter is entitled to throw the former on the fund that is not common to both. This is a narrow doctrine, and cannot generally be enforced against an incumbrancer, who is a mortgagee. Whatever may be the Equity of the creditor with only one security, the mortgagee of both estates has a

short, we may here apply the common civil maxim, *Sic*

right to compel the debtor to redeem, or he may foreclose." On the other hand, Lord Hardwicke, in Lanoy *v.* The Duke of Athol, 2 Atk. R. 446, said: "Suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first; the Court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons." See also In re Cornwall, 2 C. & L. 131; S. C. 3 Dru. & War. 173. Lord Eldon, in Aldrich *v.* Cooper, 8 Ves. 388, used language leading to the same conclusion as that of Lord Hardwicke. He said: "Suppose there was no freehold estate, but there was a copyhold estate; which the owner had subjected to a mortgage; and died. It is clear, the mortgagee having two funds might, if he pleased, resort to the copyhold estate. But would this Court compel him to resort to it? If so, the Court marshals by the necessary consequence of its act. If the Court would not compel him, is it not clear that it is purely matter of his will, whether the simple contract creditors shall be paid, or not? That, at least, contradicts all the authorities, that, if a party has two funds, (not applying now to assets particularly,) a person having an interest in one only has a right in Equity to compel the former to resort to the other, if that is necessary for the satisfaction of both. I never understood, that if A. has two mortgages, and B. has one, the right of B. to throw A. upon the security which B. cannot touch, depends upon the circumstance, whether it is a freehold or a copyhold mortgage. It does not depend upon assets only; a species of marshalling being applied in other cases; though technically, we do not apply that term except to assets. So, where in bankruptcy, the Crown by extent laying hold of all the property, even against creditors, the Crown has been confined to such property as would leave the securities of incumbrances effectual. So, in the case of the surety, it is not by the force of the contract; but that Equity, upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court, placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage of a copyhold estate, exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons." And again; "Suppose another case; two estates mortgaged to A.; and one of them mortgaged to B. He has no claim under the deed, upon the other estate. It may be so constructed, that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person, having two

utere tuo, ut non alienum lædas; and, still more emphati-

funds, shall not by his election disappoint the party having only one fund; and Equity, to satisfy both, will throw him who has two funds, upon that which can be effected by him only; to the intent that the only fund, to which the other has access, may remain clear to him. This has been carried to a great extent in bankruptcy; for a mortgagee, whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to his relief; that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect *per directum*, because the Crown affected those in pledge to him. Another case may be put; that a man died, having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A.; and the freehold estate only was mortgaged to B.; and that B. was not only a mortgagee of the freehold estate, but also a specialty creditor by a covenant or a bond. In that case as well as in this, it might be said, the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor; the fund being taken out of his reach; and there is no doubt, that, being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as a mortgagee upon the copyhold estate, the same arrangement would take place, that he in Equity shall throw the prior incumbrancer upon the estate to which the other has no resort." Mr. Powell, in his Treatise on Mortgages, (1 Powell on Mortg. 343, and Coventry & Rand's notes, Id. 1014,) and Mr. Fonblanque (2 Fonbl. Eq. B. 3, ch. 2, § 6, note *i*), seem to have taken the same view. It may perhaps be true, that the doctrine propounded by Lord Chancellor Sugden, was intended to be applied only to cases where there could be a sale of the mortgaged property, either by the original contract, or by a decree of a Court of Equity, in the exercise of its appropriate jurisdiction; and not to reach cases, where, as in England, the mortgagee had a right to, and might insist upon a foreclosure (Post, 2 Story, Eq. Jurispr. § 1026). But such a qualification of the doctrine is not intimated, as far as I have seen, except in the case before Lord Chancellor Sugden. In the late case of Barnes *v.* Rackster, (1 Younge & Coll. New Rep. 401, 403,) Mr. Vice-Chancellor Bruce seems to have thought the doctrine of Mr. Sugden to be applicable to the case, where, after the first mortgage of two estates, there are distinct mortgages to different persons of each estate mortgaged to the first mortgagee; and that, as between these last conflicting incumbrancers, Courts of Equity will not marshal the estates, but merely apportion the first charge between the two estates. It may be thought that a Court of Equity would be going too far by interfering with the creditor's right of foreclosure; and that it would be sufficient to give the second

cally, the Christian maxim, "Do unto others as you would they should do unto you."[1]

mortgagee a right to redeem the first mortgage. In America there has hitherto been no difficulty on the part of our Courts of Equity, to give full effect to the doctrine of Lord Hardwicke, in the case of two funds, and two successive mortgages. Instead of a foreclosure, the usual course is to decree a sale, as it is in Ireland; so that the main difficulty, in narrowing the rights of the first mortgagee, is avoided. See Cheeseborough *v.* Millard, 1 Johns. Ch. R. 413; Stevens *v.* Cooper, 1 Johns. Ch. R. 425; Evartson *v.* Booth, 19 Johns. R. 486; Hayes *v.* Ward, 4 Johns. Ch. R. 123; Campbell *v.* Macomb, 4 Johns. Ch. R. 534; Conrad *v.* Harrison, 3 Leigh, R. 532; 1 Powell on Mort. 343, and notes by Coventry & Rand. But, at all events, it is very certain, that wherever a creditor, by his election to take one of two funds, to which alone another creditor has the right to resort, deprives the latter of his claim to that fund, he will be permitted in Equity to stand in the place of that creditor in regard to the other fund. In Aldrich *v.* Cooper, 8 Ves. 396, Lord Eldon referred to many cases of this sort, and, among other things, said: "The cases, with respect to creditors and other classes of claimants, go exactly the same length. In the cases of legatees against assets descended, a legatee has not so strong a claim to this species of Equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid, or not. That, in some measure, is upon the doctrine of assets; but with relation to the fact of a double fund. Both are in law liable to the creditors; and therefore, by making the option to go against the one, they shall not disappoint another person, who the testator intended should be satisfied. That is not so strong, as where it is not bounty, but the party has by his own act, in his life, made liable to the whole of the debt a copyhold estate, not in law liable; and who, having also a freehold estate, must be understood to mean, that the freehold estate shall be liable according to law, to his specialty debts. The case is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees; for that is upon the supposition, that there is in the will as strong an inclination of the testator in favor of a specific devisee as a pecuniary legatee; and there-

[1] See Cheeseborough *v.* Millard, 1 Johns. Ch. R. 413; Evertson *v.* Booth, 19 Johns. R. 486; Hayes *v.* Ward, 4 Johns. Ch. R. 123; Wiggin *v.* Dorr, 3 Sumner, R. 410.

§ 634. The same principle applies to one judgment creditor, who has a right to go upon two funds, and another judgment creditor, who has a right upon one only of them, both belonging to the same debtor. The former may be compelled to apply first to the fund which cannot be reached by the second judgment; so that both judgments may be satisfied.[1] But if the first creditor has a judgment against A. and B., and the second against B. only; and it does not appear whether

fore, there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and as, by that denotation of intention, the creditor has a double fund, the land devised and the personal estate, he shall not disappoint the legatee. The case is also the same where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator; as in Lutkins *v.* Leigh; there he shall not disappoint the legatee. So the case of paraphernalia is very strong for this proposition; that wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law, or by the act of the testator." Ante, § 558, 559, 560 to 578. See also the Reporter's note to Averall *v.* Wade, Lloyd & Goold, Rep. 264, and especially p. 268, where they say; "The general principle of marshalling is, that where one claimant has two funds to resort to, and another only one, the Court will either compel the person having the double security, to resort to that fund not liable to the demand of the other (citing 2 Atk. 446, 8 Ves. 391, 395, and 1 Russ. & Mylne, 187); or, if satisfaction has been already obtained by him who has the double security, out of the fund to which alone the other can resort, the Court will allow the latter claimant to stand in the place of the former *pro tanto*." See the note to Clifton *v.* Burt, (by Cox,) 1 P. Will. 679, where the principal authorities are collected. Ante, § 561, note (5.)

[1] Dorr *v.* Shaw, 4 Johns. Ch. R. 17; Averall *v.* Wade, Lloyd & Goold, R. 252. In this last case, Lord Chancellor Sugden decided, that where a party, seised of several estates, and indebted by judgment, settled one of the estates for a valuable consideration, with a covenant against incumbrances, and subsequently acknowledged other judgments, the prior judgments should be thrown altogether upon the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estate contribute.

A. or B. ought to pay the debt due to the first creditor; nor whether any equitable right exists in B. to have the debt charged on A. alone; in such a case, Equity will not compel the creditor first to take the land of A. in satisfaction; for it is not (as we shall presently and more fully see) a case of different debts and securities against one common debtor.[1]

§ 634 *a*. Another case may easily be put, to illustrate the general doctrine, and the exceptions to it. Suppose the mortgagor to mortgage two estates to the mortgagee, and afterwards he should mortgage one of the estates to B., and the other to C., by distinct mortgages, and B. and C. should each have knowledge of the first mortgage, and C. should also have notice of B.'s mortgage at the time of taking his own; and the mortgaged estates should finally turn out not to be sufficient to pay all the three mortgages; in such a case, it would seem, that B. would not have any right to have the estates marshalled, so as to throw the whole charge upon the estate mortgaged to C., for he has no superior equity to C., and, therefore, the charge of the first mortgage ought to be ratably apportioned between B. and C.[2] But this must be propounded as open to some doubt, as there is a conflict in the authorities.[3]

[1] Dorr *v.* Shaw, 4 Johns. Ch. R. 17; Post, § 642, 643. See Ayers *v.* Husted, 15 Conn. 504; King *v.* McVicker, 3 Sandf. Ch. R. 192.

[2] Barnes *v.* Rackster, 1 Younge & Coll. New R. 401. [See Bugden *v.* Bignold, 2 Younge & Coll. C. C. 377; Bowker *v.* Bull, 1 Eng. Law & Eq. R. 126. In the last case a principal and surety having joined in a mortgage of land and bonds, containing powers of sale, and a proviso, that between the principal and surety, the principal and the land should be primarily liable for the debt, the principal afterwards again mortgaged the same land and bonds, without the surety's knowledge, to secure a farther advance. The surety was allowed to redeem, on payment of only the first sum. See also Higgins *v.* Frankis, 10 Jur. 328.]

[3] Post, § 1233 *a*; Barnes *v.* Rackster, 1 Younge & Coll. N. R. 401;

§ 635. It is not improbable, that this doctrine of marshalling securities or funds, which, under another form, had its existence in the Roman Law, and was therein called subrogation, or substitution, was derived into the jurisprudence of Equity from that source, as it might well be, since it is a doctrine belonging to an age of enlightened policy, and refined, although natural justice. In the Roman Law, (as we have already seen,) a surety upon a bond or security, paying it to the creditor, was entitled to a cession of the debt, and a subrogation or substitution to all the rights and actions of the creditor against the debtor; and the security was treated, as between the surety and the debtor, as still subsisting and unextinguished.[1] And where one creditor had any hypothecation or privilege upon property, as security for a debt, and another creditor had a like subsequent security upon the same property for another debt; there, the latter, upon payment of the prior debt to the prior creditor, was entitled to a cession of the property, and to a subrogation to all the rights and actions of the same creditor for that debt. So the doctrine is laid down in the Digest. *Plane, cum tertius creditor primum de sua pecunia dimisit, in locum ejus substituitur in ea quantitate, quam superiori exsolvit.*[2]

§ 636. We here see the original elements, from which

Governeur *v.* Lynch, 2 Paige, R. 300; Skeel *v.* Spraker, 8 Paige, R. 182; Patty *v.* Pease, 8 Paige, R. 277; Schryver *v.* Teller, 9 Paige, R. 173.

[1] Pothier on Oblig. by Evans, n. 275, 280, 281; Id. n. 428, 429, 430; Id. n. 556, 557, 558, 559 (n. 591, 592, 593, 594, of the French editions); 1 Domat, Civ. Law, B. 3, tit. 1, § 6, per tot. p. 377, 378, 379; 2 Voet, ad Pand. Lib. 46, tit. 1, § 27, 28, 29, 30; Ante, § 494, 499, 500.

[2] Dig. Lib. 20, tit. 4, l. 16, 17, l. 11, § 4, l. 12, § 9. See also 1 Domat, B. 3, tit. 1, § 6, art. 2, 3, 4, 6, 7, 8; Ante, § 500, 501.

our present system of equitable relief is, or at least, might have been, derived. The principal difference between the Roman system and ours is, that our Courts of Equity arrive directly at the same result, by compelling the first creditor to resort to the fund, over which he has a complete control, for satisfaction of his debt; and the Roman system substituted the second creditor to the rights of the first, by a cession thereof upon his payment of the debt. It is true, that the case of a double fund is not put in the text of the Civil Law; but it is an irresistible inference from the principles upon which it is founded.[1]

[1] See Pothier on Oblig. by Evans, n. 520, 521, 522, (n. 555, 556, 557, of the French editions,) B.; Hayes v. Ward, 4 Johns. Ch. R. 130 to 132; Cheeseborough v. Millard, 1 Johns. Ch. R. 414. — There are three texts of the Civil Law pointing to cases of hypothecations or mortgages, which bear upon the subject. In the Code it is said: Non omnino succedunt in locum hypothecarii creditoris hi, quorum pecunia ad creditorem transit. Hoc enim tunc observatur; cum is, qui pecuniam postea dat, sub hoc pacto credat, ut idem pignus ei obligetur, et in locum ejus succedat. Quod cum in persona tua factum non sit (judicatum est enim te pignora non accepisse,) frustra putas tibi auxilio opus esse Constitutionis nostræ ad eam rem pertinentis. And again; Si potiores creditores pecunia tua dimissi sunt, quibus obligata fuit possessio, quam emisse te dicis, ita ut pretium pervenirret ad eosdem priores creditores, in jus eorum successisti; et contra eos, qui inferiores illis fuerunt, justa defensione te tueri potes. And again: Si prior Respublica contraxit, fundusque ei est obligatus, tibi secundo creditori offerenti pecuniam potestas est, ut succedas etiam in jus Reipublicæ. Cod. Lib. 8, tit. 19, l. 1, 3, 4. Pothier has expounded the sense of these passages with admirable clearness. Pothier on Oblig. by Evans, n. 521, B. (3) (n. 556 of the French editions.) Domat, B. 3, tit. 1, § 3, art. 6, says: "Although the creditor who has a mortgage, whether general or special, may exercise his right on all lands and tenements that are subject to the mortgage, and even on those which are in possession of third persons; yet it seems agreeable to Equity, that if he can hope to recover payment of his debt out of the other effects, which remain of the debtor, he should not begin with troubling the third possessor, even although his mortgage were special; but that, before he molests the third possessor, and gives occasion to the consequences of having recourse against the

§ 637. Lord Kaimes has put the very case, as founded in a clear and indisputable principle of natural equity. After having adverted to the cases of sureties (*fidejussores*,) and *correi debendi*, (debtors bound jointly and severally to the same creditor,)[1] he proceeds to state: "Another connection, of the same nature with the former, is that between one creditor, who is infeft in two different tenements for his security, and another creditor, who hath an infeftment on one of the tenements of a later date. Here the two creditors are connected, by having the same debtor, and a security upon the same subject. Hence it follows, as in the former case, that if it be the will of the preferable creditor to draw his whole payment out of that subject, in which the other creditor is infeft, the latter, for his relief, is entitled to have the preferable security assigned to him; which can be done upon the construction above mentioned. For the sum recovered by the preferable creditor out of the subject on which the other creditor is also infeft, is justly understood to be advanced by the latter, being a sum which he was entitled to, and must have drawn, had not the preferable creditor intervened; and this sum is held to be purchase-money of the conveyance. This construction, preserving the preferable debt entire in the person of the second creditor, entitles him to draw payment of that debt out of the other tenement. By this equitable construction, matters are restored to the same state, as if the first creditor had drawn his payment out of the separate subject, leaving the other entire, for payment of

debtor, he ought to discuss the other effects remaining in the debtor's possession." See also Domat's note, ibid., and Cod. Lib. 8, tit. 14, l. 2; Ante, § 494, notes (1) and (2).

[1] Fisk. Instit. B. 3, tit. 3, § 74.

the second creditor. Utility also concurs to support this equitable claim." [1]

§ 638. But the interposition of Courts of Equity is not confined to cases strictly of two funds, and of different mortgagees; for it will be applied, (as we have seen,) in favor of sureties, where the creditor has collateral securities or pledges for his debt.[2] In such cases, the Court will place the surety exactly in the situation of the creditor, as to such securities or pledges, whenever he is called upon to pay the debt; for it would be against conscience, that the creditor should use the securities or pledges to the prejudice of the sureties, or refuse to them the benefit thereof, in aid of their own responsibility.[3] And, on the other hand, if a principal has given any securities or other pledges to his surety, the creditor is entitled to all the benefit of such securities or pledges in the hands of the surety, to be applied in payment of his debt.[4]

§ 639. Courts of Equity do not stop here. If the debt is due, and the creditor does not choose to call upon the debtor for payment, the surety may come into Equity by a bill against the creditor and the debtor,

[1] 1 Kaimes, Equity, B. 1, Pt. 1, ch. 3, § 1, p. 122, 123.

[2] Com. Dig. Chancery, 4 D. 6; Stirling *v.* Forrester, 3 Bligh, R. 590, 591; Ante, § 327, 499, 502.

[3] Aldrich *v.* Cooper, 8 Ves. 388, 389. See Gammon *v.* Stone, 1 Ves. 339; Cheeseborough *v.* Millard, 1 Johns. Ch. R. 413; Hayes *v.* Ward, 4 Johns. Ch. R. 130, 131, 132; Clasen *v.* Morris, 10 Johns. R. 524, 539; Stevens *v.* Cooper, 1 Johns. Ch. R. 430, 431; Robinson *v.* Wilson, 2 Madd. Ch. Rep. 569; Ex parte Rushforth, 10 Ves. 410, 414; Wright *v.* Morley, 11 Ves. 23; Parsons *v.* Ruddock, 2 Vern. 608; Ex parte Kendall, 17 Ves. 520; Wright *v.* Simpson, 6 Ves. 734; 2 Fonbl. Eq. B. 3, ch. 2, § 6, note (*i*); Stirling *v.* Forrester, 3 Bligh, R. 590, 591; Ante, § 324, 326.

[4] Wright *v.* Morley, 11 Ves. 22; Ante, § 327, 499, 558.

and compel the latter to make payment of the debt, so as to exonerate the surety from his responsibility; for it is unreasonable, that a man should always have such a cloud hang over him.[1] In cases of this sort, there is not, however, (as has been already stated,) any duty of active diligence incumbent upon the creditor. It is for the surety to move in the matter. But, if the surety requires the exercise of such diligence, and there is no risk, delay, or expense to the creditor, or a suitable indemnity is offered against the consequences of risk, delay, and expense, it seems, that the surety has a right to call upon the creditor to do the most he can for his benefit; and if he will not, a Court of Equity will compel him.[2]

§ 640. But, as between the debtor himself and the creditor, where the latter has a formal obligation of the debtor, and also a security, or a fund, to which he may resort for payment, there seems to be no ground to say, (at least, unless some other Equity intervenes,) that a Court of Equity ought to compel the creditor to resort to such fund, before he asserts his claim by a personal suit against his debtor. Why, in such a case, should a Court of Equity interfere to stop the election of the creditor, as to any of the remedies, which he possesses in virtue of, or under, his contract? There is nothing in natural or conventional justice, which requires it. It is

[1] Ante, § 327, 494; Ranelagh *v.* Hayes, 1 Vern. 189, 190; 1 Eq. Abridg. 17, Pl. 6; Id. 79, Pl. 5; Wright *v.* Simpson, 6 Ves. 734, Antrobus *v.* Davidson, 3 Meriv. R. 579; King *v.* Baldwin, 2 Johns. Ch. R. 561, 562, 563; S. C. 17 Johns. Rep. 384; Hayes *v.* Ward, 4 Johns. Ch. R. 432; Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Lee *v.* Rook, Mosely, R. 318.

[2] Wright *v.* Simpson, 6 Ves. 734; Nisbet *v.* Smith, 2 Bro. Ch. R. 579; Cottin *v.* Blane, 2 Anstr. R. 544; Eden on Injunct. ch. 2, p. 38, 39, 40; King *v.* Baldwin, 2 Johns. Ch. R. 561, 563; S. C. 17 Johns. R. 384; Hayes *v.* Ward, 4 Johns. Ch. R. 123; Ante, § 327, 449 *d*.

true that a different doctrine has been strenuously maintained by very learned judges, in a most elaborate manner.[1] But their opinions, however able, have been met by a reasoning exceedingly cogent, if not absolutely conclusive on the other side. And, at all events, the settled doctrine now seems to be, in conformity to the early, as well as the latest decisions, that the debtor himself has no right to insist, that the creditor, in such a case, should pretermit any of his remedies, or elect between them, unless some peculiar Equity springs up from other circumstances.[2]

§ 641. The Civil Law, as we have seen, in the case of sureties, required the creditor, in the first instance, to pursue his remedy against the debtor. But, if the surety thought himself in peril of loss by the delay of the creditor, he might compel the latter to sue the debtor; and thus obtain his indemnity. *Fidejussor* (says the Digest[3]) *an, et prius quam solvat, agere possit, ut liberetur? Nec tamen semper expectandum est, ut solvat, aut judicio accepto condemnetur; si diu in solutione reus cessabit, aut certe bona sua dissipabit; præsertim, si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat.* This is a very wholesome and just principle.[4]

1 See Lord Thurlow's opinion in Wright *v.* Nutt, 1 H. Bl. 136, 150, and Lord Loughborough in Folliot *v.* Ogden, 1 H. Bl. 124. See also Averall *v.* Wade, Lloyd & Goold, R. 255.

2 Holditch *v.* Mist, 1 P. Will. 695; Wright *v.* Simpson, 6 Ves 713, 726, 728 to 738, Lord Eldon's opinion. See Hayes *v.* Ward, 4 Johns. Ch. R. 132, 133; Eden on Injunct. ch. 2, p. 38, 39, 40; In re Babcock, 3 Story, 393.

3 Dig. Lib. 17, tit. 1, 38; King *v.* Baldwin, 2 Johns. Ch. R. 562; Hayes *v.* Ward, 4 Johns. Ch. R. 132, 133; Ante, § 327, 494.

4 Mr. Chancellor Kent, in his learned opinion in Campbell *v.* Macomb, 4 Johns. Ch. R. 538, speaking upon this subject, says: "The question on this subject, so often raised in the Civil Law, assumed the fact that the

§ 642. But, although Courts of Equity will thus administer relief to both parties in cases of double funds, which

principal debtor was in default; *Si diu in solutione reus cessabit;* and when it is added, *aut certe bona sua dissipabit*, the reference was still to the case, in which the debtor had failed to pay, and was also wasting his goods. I apprehend this must be the true construction; for the only question, raised by Marcellus in the text referred to, (Dig. Lib. 17, 1. 38, 1,) was, whether the surety could seek indemnity, before he had himself paid, *Fidejussor an, et prius quam solvat, agere possit, ut liberetur?* It was a very equitable provision in the Civil Law, to afford a remedy to the surety when the debtor neglected to pay, though the creditor had not required payment, and though the surety had not actually advanced the debt. But it would not have been very just to have given the surety an action for indemnity against the debtor, before the latter was in default, and when such a previous claim made no part of the original contract. The debtor, as the Civil Law truly observes in another place, (Dig. Lib. 17, 1, 22, 1,) has an interest not to be compelled to pay before the day; and yet I perceive that several writers on the Civil Law (Domat, Part I, B. 3, tit. 4, sec. 3, art. 3; Wood's Institutes of the Civil Law, p. 227; Brown's Lectures on the Civil Law, Vol. 1, 362,) refer to this very text to prove, that if the surety be in peril, he may sue before the time of payment, to be indemnified or discharged. It may be so; but these writers refer to no other text but that already cited, and that certainly does not, by any necessary interpretation, warrant the doctrine. Indeed, it seems to preclude it; because the remedy was intended or provided, (and so it is expressed,) especially for the case of a surety, who could not conveniently discharge the debt himself, and have his regular recourse over, at once, by the action *mandatum*. It was a benevolent provision in that view, and just in no other. In other parts of the Pandects, (Dig. Lib. 17, 1, 22, 1, and Lib. 46, 1, 31,) Paul and Ulpian lay down a rule in respect to sureties, in perfect accordance with the construction I have ventured to adopt; for they say that if the surety pays before the day, he cannot have recourse over to the debtor, until the day of payment has arrived. A number of civilians, who have very fully discussed the rights and remedies of sureties under the Civil Law, and always with this text of Marcellus in view, give us no intimation of such a doctrine. The general rule of the Civil Law was, that the action by the surety against his principal depended upon his having paid the creditor. (Inst. Lib. 3, 21, 6, and Ferriere's Inst. h. t.) And the cases, in which he might have recourse over, before payment, were all special cases; as, where judgment had already passed against the surety, or the debtor was in failing circumstances, or such a recourse over was part of the original contract, or the debtor had

are subject to the same debt; and will, in favor of sureties, marshal the securities for their benefit; yet, this will be so done in cases where no injustice is done to the common debtor; for then other equities may intervene. And the interposition always supposes, that the parties seeking aid are creditors of the same common debtor; for, if they are not, they are not entitled to have the funds marshalled, in order to leave a larger dividend out of one fund for those who can claim only against that. The principle may be easily illustrated, by supposing the case of a joint debt due to one creditor by two persons, and a several debt due by one of them to another creditor. In such a case, if the joint creditor obtains a judgment against the joint debtors, and the

neglected a long time, as from three to ten years, to pay, or the creditor to demand. In all these excepted cases, the surety might sue the debtor for his indemnity or discharge. But when might he sue him? Not before the debt was due and payable to the creditor, but before the surety had paid the creditor. The authorities to which I now refer, (Hub. Prælect. Lib 3, tit. 21, *De Fide Jussoribus*, 11; Voet, ad Pand. Lib. 46, tit. 1, 34; Pothier, Traité des Oblig. n. 441; Ersk. Inst. B. 3, c. 65,) all consider these exceptions as only providing for the relief of the surety, *ante solutionem*. He may sue the principal debtor before he has actually paid the debt; and the exceptions were to relieve him from that burden; for, without one of these special causes, says the Code, there would be no foundation, before payment, for the action of *mandatum*. (*Nulla juris ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgeri, certum est.* Code 4, 35, 10.) This plain and equitable principle, that, until the debtor is in default, either in his contract with the creditor, or in his contract with the surety, he is not bound to pay or indemnify, seems to pervade equally every part of the Civil Law. Pothier says (ubi sup. n. 412) that if the obligation, to which the surety has acceded, must, from its nature, exist a long time, as, if he was surety for the due execution of a trust, he cannot, within the time, sue the principal debtor or trustee for his discharge, *for he knew or ought to have known the nature of the obligation he contracted.* Though, where he is surety indefinitely, as, for payment of an annuity, he may after a long time, as, say ten years, demand that the principal debtor liberate him, by redeeming the annuity."

several creditor obtains a subsequent judgment against his own several debtor; a Court of Equity will not compel the joint creditor to resort to the funds of one of the joint debtors, so as to leave the second judgment in full force against the funds of the other several debtor. At least, it will not do so, unless it should appear, that the debt, though joint in form, ought to be paid by one of the debtors only; or there should be some other supervening Equity.[1]

§ 643. Another case has been put, of a similar nature, by Lord Eldon. "We have gone this length" (said he); "If A. has a right to go upon two funds, and B. upon one, having both the same debtor, A. shall take payment from that fund, to which he can resort exclusively, that, by those means of distribution, both may be paid. That takes place, where both are creditors of the same person, and have demands against funds, the property of the same person. But it was never said, that, if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more; as if B. himself could insist, that A. ought to pay, in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent, that all obligations arising out of these complicated relations may be satisfied. But, if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if *not founded in some Equity*, giving B. the right, for his own sake, to compel me to seek payment from A."[2]

[1] Dorr *v.* Shaw, 4 Johns. Ch. R. 17, 20. See Ayres *v.* Husted, 15 Conn. 504; King *v.* McVicker, 3 Sandf. Ch. 192; Newsom *v.* McLendon, 6 Georgia, 392.

[2] Ex parte Kendall, 17 Ves. 520. See Neff *v.* Miller, 8 Barr. 347; Sterling *v.* Brightbill, 5 Watts, 229; Ebenhart's Appeal, 8 Watts & Serg. 327.

§ 644. Upon this ground, where there was a partnership of five persons, one of whom died, and the other four partners continued the partnership, and afterwards became bankrupt; and the creditors of the four surviving partners sought to have the debts of the five paid out of the assets of the deceased partner, so that the dividend of the estate of the four bankrupts might be thereby increased in favor of their exclusive creditors; without showing, that the assets of the deceased partner ought, as between the partners, to pay those debts, or that there was any other Equity to justify the claim; the Court refused the relief. On that occasion the Lord Chancellor said, That, even if it was clear, that the creditors of the five partners could go against the separate assets of the deceased partner, (which, of course, depended upon equitable circumstances, as the legal remedy was against the survivors only); yet, if it was not clear that the survivors had a right to turn the creditors of the five against those assets, it did not advance the claim, that, without such arrangement, the creditors of the four would get less. Unless the latter could establish, that it is just and equitable, that the estate of the deceased partner should pay in the first instance, they had no right to compel a creditor to go against that estate, who had a right to resort to both funds.[1] Indeed, there might exist an opposite Equity; that of compelling the creditor to go first against the property of the survivors, before resorting to the estate of the deceased partner.[2]

§ 645. The ground of all these decisions is the same general doctrine already suggested, though the application of that doctrine is necessarily varied by the circum-

[1] Lord Eldon, in Ex parte Kendall, 17 Ves. 520.

[2] Ibid. See Newsom v. McLendon, 6 Georgia, R. 392.

stances. Where a creditor has a right to resort to two persons, who are his joint and several debtors, he is not compellable to yield up his remedy against either; since he has a right to stand upon the letter and spirit of his contract, unless some supervening Equity changes or modifies his rights. If each debtor is equally bound in Equity and justice for the debt, as is the case of joint debtors or partners, where both have had the full benefit of the debt, the interference of a Court of Equity, to change the responsibility from both debtors or partners to one, would seem to be utterly without any principle to support it, unless there was a duty in one of the debtors or partners, to pay the debt in discharge of the other. And, if this be so, *a fortiori*, the creditors of one of the debtors, or partners, cannot be entitled to such interference for their own benefit; for they can, in no just sense, in such a case, work out any right, except through the Equity of the debtor, or partner, under whom their title is derived.

CHAPTER XIV.

PARTITION.

§ 646. ANOTHER head of concurrent jurisdiction is that of PARTITION in cases of real estate, held by joint tenants, tenants in common, and coparceners. It is not easy, as has been well observed by Mr. Fonblanque, to trace back or establish the origin of any branch of equitable jurisdiction.[1] But the jurisdiction of Courts of Equity, in cases of partition, is, beyond question, very ancient.[2] It is curious enough to observe the terms of apparent indignation, with which Mr. Hargrave has spoken of this jurisdiction, as if it were not only new, but a clear usurpation. Yet he admits its existence and practical exercise, as early as the reign of Queen Elizabeth;[3] a period so remote, that at least one half of the law, which is at

[1] 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*); Miller *v.* Warmington, 1 Jac. & Walk. 484.

[2] [The jurisdiction of Courts of Equity however, did not extend to all real estates. They had no power, previous to stat. 4 & 5 Vict. c. 35, s. 85, to direct the partition of copyholds, nor of customary freeholds. Horncastle *v.* Charlesworth, 11 Sim. 315; Jope *v.* Morshead, 6 Beavan, 217; Burrell *v.* Dodd, 3 B. & P. 378; although they might decree specific performance of an *agreement* to divide copyholds. Bolton *v.* Ward, 4 Hare, 350. And a partition of a manor is within the power of a Court of Equity. Hanbury *v.* Hussey, 14 Beavan, 152; 5 Eng. Law & Eq. R. 81. The writ of partition at law, being abolished in England by stat. 304 Will. 4, c. 27, s. 36, Equity now has exclusive jurisdiction.]

[3] See Mr. Fonblanque's Remarks on the passage, 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*).

present, by way of distinction, called the Common Law, and regulates the rights of property, and the operation of contracts, and especially of commercial contracts, has had its origin since that time. "A new and compulsory mode of partition (says Mr. Hargrave) has sprung up, and is now fully established; namely, by decree of Chancery, exercising its equitable jurisdiction on a bill filed, praying for a partition; in which it is usual for the Court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition, and wresting from a Court of Common Law its ancient exclusive jurisdiction of this subject, might be traced, by examining the records of Chancery, I know not. But the earliest instance of a bill of partition, I observe, to be noticed in the printed books, is a case of the 48th Elizabeth, in Tothill's Transactions of Chancery, title, *Partition*.[1] According to this short Report of the case, the Court interfered from necessity, in respect of the minority of one of the parties, the book expressing, that, on that account, he could not be made a party to a writ of partition; which reason seems very inaccurate; for, if Lord Coke is right, that writ doth lie against an infant, and he shall not have his age in it, and, after judgment, he is bound by the partition.[2] But, probably, in Lord Coke's time, this was a rare, and rather unsettled mode of compelling partition; for, I observe, in a case in Chancery, of the 6th Car. I., which was referred to the Judges on a point of law between two coparceners, that the Judges certified for issuing a writ of par-

[1] Speke *v.* Walrond, &c. (*a*), Tothill's Trans. 155, (edit. 1649).
[2] Co. Litt. 171 *b*.

tition between them, and that the Court ordered one accordingly; which, I presume, would scarcely have been done, if the decree for partition, and a commission to make it, had then been a current and familiar proceeding with Chancery.[1] However, it appears by the language of the Court, in a very important cause, in which the grand question was, Whether the Lord Chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James II., bills of partition were become common."[2]

§ 617. These remarks of the learned author are open to much criticism, if it were the object of these Commentaries to indulge in such a course of discussion. It cannot, however, escape notice that, when the learned author speaks of this branch of equitable jurisdiction, as trenching upon the writ of partition, and wresting from the Courts of Common Law their ancient *exclusive* jurisdiction over the subject, he assumes the very matter in controversy. That the writ of partition is a very ancient course of proceeding at the Common Law is not doubted. But it by no means follows, that the Courts of Common Law had an exclusive jurisdiction over the subject of partition. The contrary may fairly be deemed to have been the case, from the notorious inadequacy of that writ to attain, in many cases, the purposes of justice. Thus, for instance, we know that, until the reign of Henry VIII., no writ of partition lay, except in the case of parceners. Littleton (§ 264) expressly says; "For such a writ lyeth by parceners only." And to show how narrowly the whole remedial justice of this writ was construed, it was the known set-

[1] Chan. Rep. 49.

[2] Hargrave's note (2) to Co. Litt. 169 *b*.

tled doctrine, that, if two coparceners be, and one should aliene in fee, the remaining parcener might bring a writ of partition against the alienee; but the alienee could not have such a writ *against* the parcener. And the like diversity existed in cases of a writ of partition by or against a tenant by the curtesy.[1] Now, such a case would, upon the very face of it, constitute a clear case for the interposition of a Court of Chancery; upon the ground of the total defect of any remedy at law, and yet of an unquestionable equitable right to partition. Cases of joint tenancy and tenancy in common afford equally striking illustrations. Until the Statute of 31st Henry VIII., ch. 1, and 32d Henry VIII., ch. 32, no writ of partition lay at law for a joint tenant or tenant in common.[2] And yet the grossest injustice might have arisen, if a Court of Chancery could not, in such a case, have interposed, and granted relief, upon the analogy to the legal remedy. The reason given at the Common Law against partition in such cases was more specious than solid. It was, that a joint tenancy being an estate originally created by the act or agreement of the parties, the law would not permit any one or more of the tenants to destroy the united possession without a similar universal consent. The good sense of the doctrine would rather seem to be, that the joint tenancy being created by the act or agreement of the parties, in a case capable of a severance of interest, the joint interest should continue (exactly as in cases of partnership) so long as, and no longer than, both parties should consent to its continuance.

[1] Co. Litt. 175 *a*.

[2] Co. Litt. 175 *a*; 2 Black. Comm. 185; Com. Dig. *Parcener*, C. 6; Miller *v.* Warmington, 1 Jac. & Walk. 473; Baring *v.* Nash, 1 Ves. & B. 555.

§ 648. Mr. Justice Blackstone has cited the Civil Law, as confirmatory of the reasoning of the Common Law; *Nemo enim invisus compellitur ad communionem.*[1] But that law deemed it against good morals to compel joint owners to hold a thing in common; since it could not fail to occasion strife and disagreement among them. Hence, the acknowledged rule was, *In communione vel societate nemo compellitur invitus detineri.*[2] And, therefore, a decree of partition might always be insisted on, even when some of the part-owners did not desire it. *Communi dividendo judicium ideo necessarium fuit, quod* pro socio *actio magis ad personales invicem præstationes pertinet, quam ad communem rerum divisionem.*[3] *Etsi non omnes, qui rem communem habent, sed certi ex his dividere desiderant, hoc judicium inter eos accipi potest.*[4]

§ 649. But, independently of considerations of this sort, which might have brought many cases of partition into the Court of Chancery, in very early times, from the manifest defect of any remedy at law, there must have been many cases, where bills for partition were properly entertainable upon the ordinary ground of a discovery wanted, or of other equities, intervening between the parties.[5] Lord Loughborough, upon one occasion, said, that there is no original jurisdiction in Chancery in partition, which is a proceeding at the Common Law.[6] This may be true, *sub modo*, where the party is completely remedial

1 Dig. Lib. 12, tit. 6, l. 26, § 4; 2 Black. Comm. 185, note (c).

2 Cod. Lib. 3, tit. 37, l. 5, ult.

3 Dig. Lib. 10, tit. 3, l. 1; 1 Domat, Civ. Law, B. 2, tit. 5, § 2, art. 11.

4 Dig. Lib. 10, tit. 3, l. 8; 1 Domat, Civ. Law, B. 2, tit. 5, § 2, art. 11, p. 303, 306; Id. B. 1, tit. 4, § 1, p. 632, 633; Fulbeck's Parallel, B. 2, p. 57, 58; Ersk. Inst. B. 3, tit. 3, § 56; 1 Stair's Inst. 48.

5 See Watson *v.* Duke of Northumberland, 11 Ves. 155, *Arguendo.*

6 Mundy *v.* Mundy, 2 Ves. jr. 124.

at law; but not otherwise. On another occasion his Lordship said; "A party, choosing to have a partition, has the law open to him; there is no equity for it. But the jurisdiction of this Court obtained upon a principle of *convenience*. It is not for the Court to say, one party shall not hold his estate, as he pleases; but another person has also the same right to enjoy his part, as he pleases; and, therefore, to have the estate divided. The law has provided, that one shall not defeat the right of the other to the divided estate. Then, the only question is, Whether the legal mode of proceeding is so convenient, as the means this Court affords, to settle the interest between them with perfect fairness and equality. It is evident, that the commission is much more convenient than the writ; the valuation of these proportions is much more considered; the interests of all parties are much better attended to; and it is a work carried on for the common benefit of both."[1]

§ 650. This language (it must certainly be admitted) is sufficiently loose and general. But it appears to be by no means a just description of the true nature and reason of the jurisdiction of Courts of Equity in cases of Partition. It is not a jurisdiction founded at all in mere convenience; but in the judicial incompetency of the Courts of Common Law, to furnish a plain, complete, and adequate remedy for such cases.[2] The true ground is far more correctly stated by Lord Redesdale, in his admirable Treatise on Pleadings in Equity. "In cases of partition of an estate," says he, "if the titles of the

[1] Calmady *v.* Calmady, 2 Ves. jr. 570. See also Baring *v.* Nash, 1 Ves. & Beam. 555.

[2] Mitford, Pl. Eq. by Jeremy, 120; Strickland *v.* Strickland, 6 Beav. R. 77, 31; Ante, § 627, note.

parties are in any degree complicated, the difficulties, which have occurred in proceeding at the Common Law, have led to applications to Courts of Equity for partitions, which are effected by first ascertaining the rights of the several persons interested; and then issuing a commission to make the partition required; and, upon the return of the commissioners, and confirmation of that return by the Court, the partition is finally completed by mutual conveyances of the allotments made to the several parties." [1]

§ 651. The ground, here stated, is of a complication of titles, as the true foundation of the Jurisdiction. But it is not even here expressed with entire legal precision. However complicated the titles of the parties might be, still, if they could be thoroughly investigated at law, in the usual course of proceedings in the Common Law Courts, there would seem to be no sufficient reason for transferring the jurisdiction of such cases to the Courts of Equity. The true expression of the doctrine should

[1] Mitford, Pl. Eq. by Jeremy, 120; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 120, 121. The Commissioners do not ascertain the interests of the respective parties; but the Court first ascertains the interest and the proportion of each party in the land; and then the Commissioners make the allotments accordingly. Agar *v.* Fairfax, 17 Ves. 543. The mode of ascertainment is through the instrumentality of a Master, to whom the subject is referred. Id. See also Phelps *v.* Green, 4 Johns. Ch. R. 301, 305; Burham *v.* Burham, 2 Barb. Ch. R. 404. But the Court will generally, where the title is denied, and has not been established at law, require it to be first established at law; and will retain the bill to await the decision. Wilkin *v.* Wilkin, 1 Johns. Ch. R. 117; Parker *v.* Gerrard, Ambler, R. 236; Phelps *v.* Green, 3 Johns. Ch. R. 305; Cox *v.* Smith, 4 Johns. Ch. R. 271, 276. [Manners *v.* Manners, 1 Greens, Ch. R. 381. For unless the title of *both* parties is clear, Equity cannot decree a partition. Garret *v.* White, 3 Iredell, Eq. R. 13. So the plaintiff must show that he is entitled to a partition against the defendant. Ramsay *v.* Bell, 3 Iredell, Eq. R. 209.]

have been, that Courts of Equity interfere in cases of such a complication of titles, because the remedy at law is inadequate and imperfect, without the aid of a Court of Equity to promote a discovery, or to remove obstructions to the right, or to grant some other equitable redress.[1] Besides; the remedy in Courts of Equity, even in such cases, is more perfect and extensive than at law; for, in Equity conveyances are directed to be made by the parties in pursuance of the allotments of the Commissioners, which is a mode of redress of great importance, as a permanent muniment of title, and of which a Court of Law is, by its own structure, incapable.

§ 652. This is very clearly but briefly, stated in a judgment of Lord Redesdale. "Partition at Law" (said that learned Judge) "and in Equity are different things. The first operates by the judgment of a Court of Law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in Equity pro-

[1] See Manaton *v.* Squire, 2 Freem. 26; Agar *v.* Fairfax, 17 Ves. 551; Watson *v.* Duke of Northumberland, 11 Ves. 153; Mitford, Pl. Eq. by Jeremy, 120; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 20, 21; Jeremy on Equity Jurisd. B. 3, ch. 1, § 1, p. 303, 304.—This is the ground of the jurisdiction, as stated by Lord Eldon in Agar *v.* Fairfax, (17 Ves. 551). "This Court," (said he) "issues the commission, not under the authority of any act of Parliament, but on account of the extreme difficulty attending the process of partition at law; where the plaintiff must prove his title, as he declares, and also the titles of the defendants; and judgment is given for partition according to the respective titles so proved. This is attended with so much difficulty, that, by analogy to the jurisdiction of a Court of Equity in the case of Dower, a partition may be obtained by Bill. The plaintiff must, however, state upon the record his own title, and the titles of the defendants; and, with a view to enable the plaintiff to obtain a judgment for partition, the Court will direct inquiries to ascertain who are together with him entitled to the whole subject." The inquirers are (as we have seen,) by a reference to a Master. See the form of a Decree in Partition in 17 Ves. 545, 553, 554; Strickland *v.* Strickland, 6 Beav. R. 77, 80, 81; Ante, § 627, note.

ceeds upon conveyances to be executed by the parties; and, if the parties be not competent to execute the conveyances, the partition cannot be effectually had."[1] Hence, if the infancy of the parties, or other circumstances, prevent such mutual conveyances, the decree can only extend to make the partition, give possession, and order enjoyment accordingly, until effectual conveyances can be made. If the defect arise from infancy,[2] the infant must have a day after attaining twenty-one years, to show cause against the decree.[3] If a contingent remainder, not barable or extinguishable, is limited to a person not in existence, the conveyance cannot be made until he comes into being, and is capable, or until the contingency is determined. An executory devise may occasion a similar embarrassment. And, in either of these cases, a supplemental bill will be necessary to carry the original decree into execution.[4]

§ 653. It is upon this account, that Lord Hardwicke has spoken of the remedy by partition in Equity, as being discretionary, and not a matter of right in the parties. "Here," (said he,) "the reason" (that the plaintiff should show a title in himself, and not allege, gener-

[1] Whaley *v.* Dawson, 2 Sch. & Lefr. 371, 372.

[2] [In New York an infant cannot maintain a suit in Equity for partition, either alone, or as a joint party with a co-tenant of full age. *All* parties must be adults. Postley *v.* Rain, 4 Sandf. Ch. R. 508.]

[3] [By stat. 13 & 14 Vict. c. 60, s. 7 & 30, an infant no longer has a day in Court, according to the old forms of decrees, but he is declared a trustee of such portions as are awarded the other parties. See Brown *v.* Wright, 3 Eng. Law & Eq. R. 190.]

[4] Mitford, Pl. Eq. by Jeremy, 120, 121; Attorney-General *v.* Hamilton, 1 Madd. Rep. 214; Wills *v.* Slade, 6 Ves. 498; Com. Dig. Chancery, 4 E; Brook *v.* Hertford, 3 P. Will. 518, 519; Tuckfield *v.* Buller, 1 Dick. R. 210; Thomas *v.* Gyles, 2 Vern. 232; Gaskell *v.* Gaskell, 6 Sim. R. 613. See Martyn *v.* Perryman, 1 Rep. in Ch. 235; Post, § 656 *a*.

rally, that he is in possession of a moiety of the land) "is because conveyances are directed, and not a partition only; which makes it discretionary in this Court, where a plaintiff has a legal title, [whether] they [it] will grant a partition or not; and where there are suspicious circumstances in the plaintiff's title, the Court will leave him to law."[1] His Lordship was here speaking of legal titles; for, in the same case, he expressly stated, that, where the bill for a partition was founded on an equitable title, a Court of Equity might determine it; or, otherwise, it would be without remedy.[2] And, indeed, if there are no suspicious circumstances, but the title is clear at law, the remedy for a partition in Equity is as much a matter of right, as at law.[3]

§ 654. In regard to partitions, there is also another distinct ground, upon which the jurisdiction of Courts of Equity is maintainable, as it constitutes a part of its appropriate and peculiar remedial justice. It is, that Courts of Equity are not restrained, as Courts of Law are, to a mere partition or allotment of the lands and other real estate between the parties, according to their respective interests in the same, and having a regard to the

[1] Cartwright v. Pulteney, 2 Atk. 380. [If the plaintiff does not prove his title, the bill will be dismissed. Jope v. Morshead, 6 Beav. 213. A tenant by the curtesy initiate has sufficient title to support a bill for partition. Riker v. Darke, 4 Edw. Ch. R. 668.]

[2] Ibid. — It is essential to a partition in Equity, that the legal title should be before the Court. It would be a decisive answer, that the equitable title only is before the Court; for then, how could the conveyances be made, if any should be necessary? See the opinion of Sir Thomas Plumer (Master of the Rolls) in Miller v. Warmington, 1 Jac. & Walk. 473. See Hosford v. Marvin, 5 Barb. 51.

[3] Baring v. Nash, 1 Ves. & B. 555, 556; Parker v. Gerrard, Ambler, R. 236, and Mr. Blunt's note; Wisely v. Findlay, 3 Rand, 361, 398; Smith v. Smith, 10 Paige, 473; Post, § 656.

true value thereof.[1] But Courts of Equity may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality.[2] This a Court of Common Law is not at liberty to do; for, when a partition is awarded by such a Court, the exigency of the writ is, that the sheriff do cause, by a jury of twelve men, the partition to be made of the premises between the parties, regard being had to the true value thereof; without any authority to make any compensation for any inequality in any other manner.[3]

§ 655. Cases of a different nature, involving equitable compensation, to which a Court of Law is utterly inadequate, may easily be put; such, for instance, as cases, where one party has laid out large sums in improvements on the estate. For, although, under such circumstances, the money so laid out does not, in strictness constitute a lien on the estate; yet, a Court of Equity will not grant a partition without first directing an ac-

1 Co. Litt. 176, *a* and *b.*; Id. 168 *a.*

2 See Calmady *v.* Calmady, 2 Ves. jr. 570; Earl of Clarendon *v.* Hornby, 1 P. Will. 446, 447; Warner *v.* Baynes, Ambler, R. 589; Wilkin *v.* Wilkin, 1 Johns. Ch. R. 116, 117; Phelps *v.* Green, 3 Johns. Ch. R. 302, 305; Larkin *v.* Mann, 2 Paige, R. 27; Storey *v.* Johnson, 1 Younge & Coll. 538; S. C. 2 Younge & Coll. 586, 610, 611; Post, § 657; Cole *v.* Sewell, 15 Sim. 284. [But this power rests only with the *Court.* The Commissioners themselves cannot award a sum to be paid for owelty of partition. Mole *v.* Mansfield, 15 Sim. 41.]

3 Co. Litt. 167, *d.*; Com. Dig. *Pleader*, 3 F. 4. — Littleton (§ 251) has spoken of a rent-charge in cases of partition for owelty or equality in partition. But this not in a case of compulsive partition by writ; but of a voluntary partition by deed or by parol, as the context abundantly shows. Co. Litt. 168, *b.*; Litt. § 250, 252.

count, and compelling the party applying for partition to make due compensation.[1] So, where one tenant in common has been in the exclusive perception of the rents and profits, on a bill for a partition and account, the latter will also be decreed.[2] So where one tenant in common, supposing himself to be legally entitled to the whole premises, has erected valuable buildings thereon, he will be entitled to an equitable partition of the premises, so as to give him the benefit of his improvements; or if that cannot be done, he will be entitled to a compensation for those improvements.[3]

§ 656. Indeed, in a great variety of cases, especially where the property is of a very complicated nature, as to rights, easements, modes of enjoyment, and interfering claims, the interposition of a Court seems indispensible for the purposes of justice. For since partition is ordinarily a matter of right, no difficulty in making a partition is allowed to prevail in Equity, whatever may be the case at law, as the powers of the Court are adequate to a full and just compensatory adjustment.[4] There have been cases disposed of in Equity which seemed almost impracticable for allotment at law, as in the case of the Cold Bath Fields, in which Lord Hardwicke did not hesitate to act, notwithstanding the admitted difficulties.[5] Nor does it constitute any ob-

[1] Swan *v.* Swan, 8 Price, R. 518; Green *v.* Putnam, 1 Barb. 500, Conklin *v.* Conklin, 3 Sandf. Ch. R. 61.

[2] Hill *v.* Fulbrook, 1 Jac. R. 574; Lorimer *v.* Lorimer, 5 Madd. R. 363; Storey *v.* Johnson, 1 Younge & Coll. 538; S. C. 2 Younge & Coll. 586.

[3] Town *v.* Needham, 3 Paige, R. 546, 555. See, also, Teal *v.* Woodworth, 3 Paige, R. 470.

[4] Ante, § 653.

[5] Warner *v.* Baynes, Ambler, R. 589; Turner *v.* Morgan, 8 Ves. 143, 144.

jection in Equity, that the partition does not or may not finally conclude the interests of all persons; as, where the partition is asked only by or against a tenant for life, or where there are contingent interests to vest in persons not *in esse*.[1] For the Court will still proceed to make partition between the parties before the Court, who possess competent present interests, such as a tenant for life, or for years.[2] But under such circumstances, the partition is binding upon those parties only who are before the Court, and those whom they virtually represent;[3] and the interests of third persons are not affected.[4] And it is not an unimportant ingredient in the exercise of Equity jurisdiction, in cases of partition, that the parties in interest may be brought before the Court, far more extensively than they can be by any processes known to the Courts of Law, for the purpose of doing complete justice.[5]

§ 656 *a*. Doubts were formerly entertained, whether in a suit in Equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. That doubt, however, is now removed; and the decree is held binding upon them, upon the ground of a virtual representation of them by the

[1] Gaskell *v.* Gaskell, 6 Sim. 643.

[2] Wills *v.* Slade, 6 Ves. 498; Baring *v.* Nash, 1 Ves. & B. 555; Wotten *v.* Copeland, 7 Johns. Ch. R. 140; Gaskell *v.* Gaskell, 6 Sim. R. 643; Striker *v.* Mott, 2 Paige, R. 387, 389; Woodworth *v.* Campbell, 5 Paige, R. 518.

[3] Story on Equity Pleadings, § 144 to 148; Gaskell *v.* Gaskell, 6 Sim. R. 643.

[4] Agar *v.* Fairfax, 17 Ves. 544.

[5] Anon. 3 Swanst. R. 139, note (*b*).

tenant for life in such cases.[1] But if the partition is made in pursuance of an agreement between the tenant for life and the other party, under such circumstances, the Court will direct it to be referred to a Master, to inquire and state whether it will be for the future benefit of the remainder-men, that the agreement should be carried into execution without any variations, or if with variations, what the variations ought to be.[2]

§ 656 *b*. In suits in Equity, also for partition, various other equitable rights and claims and adjustments will be made, which are beyond the reach of Courts of Law. Thus, if improvements have been made by one tenant in common, a suitable compensation will (as we have seen) be made him upon the partition, or the property on which the improvements have been made, assigned to him.[3] So Courts of Equity will not take care, that the parties have an equal share and just compensation; but they will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them with reference to their respective situations, in relation to the property before the partition.[4] For in all cases of partition, a Court of Equity does not act merely in a ministerial character, and in obedience to the call of the parties, who have a right to the partition; but it founds itself upon its general jurisdiction as a Court of Equity, and administers its relief *ex æquo et bono*, according to its own

[1] Gaskell *v.* Gaskell, 6 Sim. R. 643. See, also, Martyn *v.* Perryman, 1 Ch. Rep. 235; Brook *v.* Hertford, 2 P. Will. 518: Ante, § 653.

[2] Gaskell *v.* Gaskell, 6 Sim. R. 643.

[3] Ante, § 655.

[4] Storey *v.* Johnson, 1 Younge & Coll. 538; S. C. 2 Younge & Coll. 586; Green *v.* Putnam, Barb. 509.

notions of general justice and Equity between the parties. It will, therefore, by its decree,[1] adjust all the equitable rights of the parties interested in the estate; and will, if necessary for this purpose, give special instructions to the commissioners,[2] and nominate the commissioners, instead of allowing them to be nominated by the parties.[3]

§ 656 *c*. And Courts of Equity, in making these adjustments, will not confine themselves to the mere legal rights of the original tenants in common, but will have regard to the legal and equitable rights of all other parties interested in the estate, which have been derived from any of the original tenants in common; and will, if necessary for this purpose, direct a distinct partition of each of several portions of the estate, in which the derivative alienees have a distinct interest, in order to protect that interest.[4] Thus, where A. B., and C. were tenants in common in undivided third parts of an estate, comprising Whiteacre and Blackacre, and C. had conveyed his interest in Blackacre to D., and his interest in Whiteacre to E.; upon a bill filed by A. and B., for partition of the whole estate, the Court directed that Blackacre should be divided into three parts, and one part should be conveyed to A., and B., and D., respectively; and that Whiteacre should be divided into three parts, and one part should be con-

[1] [Such a decree amounts to no more than an ordinary conveyance. Anderson *v*. Hughes, 5 Strobh. 71.]

[2] [The report of the Commissioners is regarded in the same light as the verdict of a jury on a trial at law; and will not be set aside except upon grounds similar to those for which a new trial at law is granted. Livingston *v*. Clarkson, 4 Edw. Ch. R. 596.]

[3] Ibid.; Haywood *v*. Judson, 4 Barbour, 228.

[4] Ibid.

veyed to A., and B., and E., respectively. In this way consistently with the rights of A. and B., the interest of D. and E. were, as in Equity they ought to be, fully protected and secured.

§ 657. In Equity, too, (and it would seem, that the same rule prevails at law, though this has sometimes been doubted,)[2] where there are divers parcels of lands, messuages, and houses, partition need not be made of each estate separately, so as to give to each party his moiety or other portion in every estate. But the whole of one estate may be allotted to one, and the whole of another estate to the other, provided that his equal share is allotted to each.[3] But it is obvious, that, at law, such a partition can rarely be conveniently made, because the Court cannot decree compensation, so as to make up for any inequality, which must ordinarily occur in the allotment of different estates to each party. In Equity it is in the ordinary course.[4]

§ 658. It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of Courts of Equity and their ability to clear away all intermediate obstructions against complete justice, that these Courts have assumed a general concurrent jurisdiction with Courts of Law in

1 Story *v.* Johnson, 1 Younge & Coll. 538; S. C. 2 Younge & Coll. 586.

2 See *Arguendo* in Earl of Clarendon *v.* Hornby, 1 P. Will. 446, 447; Storey *v.* Johnson, 1 Younge & Coll. 538; S. C. 2 Younge & Coll. 586.

3 Earl of Clarendon *v.* Hornby, 1 P. Will. 446, 447.

4 Ibid.; Ante, § 654. [In New York, by statute, a part of the land may be allotted to one of the parties, and the rest ordered to be sold and distributed. Hayward *v.* Judson, 4 Barb. 228.]

all cases of partition.[1] So that, it is not now deemed necessary to state, in the bill, any peculiar ground of equitable interference.[2] And, unless I am greatly misled in my judgment, this review of the true sources and objects of this concurrent jurisdiction demonstrates, in the most satisfactory manner, how ill-founded the animadversions of Mr. Hargrave (already cited) are, upon the exercise of this jurisdiction.[3] But the most conclusive proof in its favor is, that wherever it exists, it has almost entirely superseded any resort to Courts of Law to obtain a partition. In making partition, however, Courts of Equity generally follow the analogies of the law; and will decree it in such cases, as the Courts of law recognize as fit for their interference.[4] But Courts of Equity are not, therefore, to be understood as limiting their jurisdiction in partition, to cases cognizable or relievable at law;[5] for there is no doubt, that they may interfere in cases where a partition would not lie at law;[6] as, for instance, in the case, where an equitable title is set up,[7] [or, where the estate to be divided is incorporeal.]

[1] Haywood *v.* Hudson, 4 Barb. 229.

[2] Mitford, Plead. Eq. by Jeremy, 120; Jeremy on Eq. Jurisd. B. 3, ch. 1, § 2, p. 304, 305; 1 Fonbl. Eq. B. 1, ch. 1, § 3, note (*f*), p. 10, 21.

[3] Ante, § 646.

[4] Ibid.; Wills *v.* Slade, 6 Ves. 498; Baring *v.* Nash, 1 Ves. & B. 555.

[5] See Bailey *v.* Sisson, 1 Rhode Island, R. 233.

[6] Swan *v.* Swan, 8 Price, R. 519; Woodworth *v.* Campbell, 5 Paige, 518; Haywood *v.* Judson, 4 Barb. 228.

[7] Cartwright *v.* Pulteney, 2 Atk. 380; Cox *v.* Smith, 4 Johns. Ch. R. 276. See Hosford *v.* Merwin, 5 Barb. S. C. R. 51; Miller *v.* Warmington, 1 Jac. & Walk. 473; Com. Dig. Chancery, 4 E. *Partition;* Ante, § 653.

CHAPTER XV.

PARTNERSHIP.

§ 659. ANOTHER head of concurrent jurisdiction, arising from similar causes, is in relation to PARTNERSHIP.[1] In cases of this nature, where a remedy at law actually exists, it is often found to be very imperfect, inconvenient, and circuitous. But in a very great variety of cases, there is, in fact, no remedy at all at law, to meet the exigency of the case. We shall, in the first instance, take notice of such remedies as exist at law; and then proceed to the consideration of others, which are peculiar to Courts of Equity.

§ 660. And here, it may be proper to begin by a reference to that, which is, in its own nature, preliminary to all other inquiries, to wit, the actual existence of the partnership itself. Although, in many cases, written articles or instruments of partnership exist, as the foundation of the joint concerns; yet, in many other cases, the partnership itself exists merely in parol. And, even in cases of written articles, there are many defects and omissions, which the parties have left unprovided for. Now, a controversy may arise in regard to the existence of the partnership between the partners themselves, or between them and third persons. In each case its

[1] See Com. Dig. Chancery, 3 V. 6.

existence may mainly depend upon the discovery to be obtained through the instrumentality of a Court of Equity. If written articles exist, they may be suppressed or concealed; if none exist, it may be impracticable to obtain due knowledge of the partnership by any competent witnesses in the ordinary course of law. But, in by far the most numerous and important class of cases, that of secret and dormant partners, there may not be, and indeed, ordinarily, will not be, any adequate means at law to get at the names or numbers of the partners. In all such cases, the powers of a Court of Equity will be found most effective, by means of a bill of discovery, to bring out all the facts, as well in controversies between the partners themselves, as between them and third persons.

§ 661. But, admitting a partnership to exist, let us now proceed to consider, what are the remedies at law, which exist between the partners themselves. These, of course, are dependent upon the nature of the partnership, and the grievance, for which a remedy is sought. If the articles of partnership are under seal, and any violation of any of the stipulations therein contained exists, it may be, and is, properly, remediable by an action of covenant. If there are written articles not under seal, or the partnership is, by a parol agreement, the proper remedy, for any breach of the stipulations, is by an action of assumpsit. But, as we shall presently see, both these remedies are utterly inadequate to provide for many exigencies and injuries, which may arise out of the violation of partnership rights and duties.

§ 662. The most extensive, and generally the most operative remedy at law, between partners, is an action of account. This is the appropriate, and, except under very peculiar circumstances, is the only remedy, at the

Common Law, for the final adjustment and settlement of partnership transactions. It is a very ancient remedy between partners, in which one, naming himself a merchant, may sue his partner for a reasonable account, naming him a merchant, and charging him, as the receiver of the moneys of himself, arising from whatever cause or contract, for the common profit of both, according to the Law Merchant.[1]

§ 663. But it is wholly unnecessary to dwell upon the inadequacy of this remedy in cases of partnership, as all the remarks already made, in respect to the dilatory, cumbrous, and inconvenient proceedings in actions of account,[2] apply, with augmented force, to cases of partnership, where it is absolutely impossible, in many cases, to settle the concerns of the partnership, without the production of books, vouchers, and other documents, belonging to the partnership, and the personal examination of the partners themselves. So intimate is the confidence, and so universal the community of interest and operations between partners, that no proceedings, not including a thorough and minute discovery, can enable any Court to arrive at the means of doing even reasonable justice between them. And, in addition to the common difficulties in ordinary cases, the death of either partner puts an end, at the Common Law, to any means of enforcing this remedy by account; for it being founded in privity between the parties, no suit lay by, or against the personal representative of the deceased partner, to compel an account.[3]

§ 664. In a few cases, indeed, where there has been a covenant or promise to account, Courts of Law have

[1] Co. Litt. 172 *a*; Fitz. N. B. 117 D.
[2] Ante, § 442 to 449.
[3] Ante, § 446.

attempted to approximate towards an effectual remedy in the shape of damages for a breach of the obligation. But it is manifest, that, even in these cases, the damages must be wholly uncertain, unless an account can be fully and fairly taken between the parties; for, otherwise, there will be no rule, by which to ascertain the damages. There has, too, been a struggle, in cases, where one partner has been compelled to advance or pay money on the partnership account out of his own private funds, to give him a remedy at law for a contribution from the other partners. But it is difficult to perceive, how, except under very peculiar circumstances, such a remedy will lie.[1] For it is impossible, during

[1] It is no part of the object of these Commentaries, to show in minute detail, the nature and extent of the legal remedies, in cases of this sort. Where the partnership has been dissolved, and upon such a dissolution, all the accounts of the partnership have been adjusted, as between the partners; or where one partner has purchased the property, and agreed to pay all the debts; there, if the other partner is called upon to pay a partnership debt, he may be entitled at law to contribution. So, where, upon a dissolution of a partnership, all the accounts have been adjusted, and a balance struck, an action at law will lie for such balance. So, where a sum of money has been received for one partner's separate account by the other partners, he may recover the same in an action of Assumpsit, as money had and received for his use. But all these, and other cases of the like nature, stand upon their own special circumstances, and steer wide of the general doctrine. There is no case in the English Courts, (although there may be cases in some of the American Courts,) where any action at law, except on account, has been held to lie generally to settle partnership accounts, or for a contribution by one partner against the others, for money paid by him for the use of the partnership. The learned reader will find many of the cases collected and commented on in Mr. Collyer's valuable work on Partnership, B. 2, ch. 3, § 1, 2, 4, and in the notes of the able American editor, Mr. Phillips, in his edition of that work. Mr. Gow, in his work on the same subject, (ch. 2, § 3,) has discussed the same subject at large; and in his last (the third) edition, he has corrected some of the inadvertencies, into which he had fallen, on this subject, by relying too much upon some loose dicta in some of the author-

the continuance of the partnership, without taking a general account, to say, that any one partner, so called upon to advance or to pay money, is, on the whole, a creditor of the firm to such an amount. And if he is, how, in point of technical propriety, can he institute a remedy against his other partners alone, as contradistinguished from the partnership? It is very certain, that, if he should lend the partnership a sum of money, he could not sue for it at law, for he could not sue himself; and it is not very easy to perceive a clear distinction between this and the former case. And if it should turn out, upon taking a general account, that such partner was a debtor to the partnership, it would be unreasonable and useless to allow him to recover the very money, which he must refund to the partnership; for the maxim of common sense, as well as of common justice, is, *Frustra petis, quod statim alteri reddere cogeris.*[1]

§ 665. Cases have also occurred, in which suits at law have been maintained for the breach of an agreement to furnish a certain sum or stock for the partnership purposes. In such a case the transaction is not so much a partnership transaction, as an agreement to launch the partnership; and an agreement to pay money or furnish stock, for such a purpose, is an individual engagement of each partner to the other.[2] For the breach of such an agreement, there seems no reasonable objection to the maintainance of a suit at law.[3] But, what should

ities. See also Holmes *v.* Higgins, 1 B. & Cressw. 74; Harvey *v.* Crickett, 5 M. & Selw. 336; Bovill *v.* Hammond, 6 B. & Cresw. 149.

[1] Branch's Maxims, 55.

[2] See Venning *v.* Leckie, 13 East, R. 7; Gale *v.* Leckie, 2 Stark, R. 107; Terrill *v.* Richards, 1 Nott & McCord, R. 20.

[3] See Vance *v.* Blain, 18 Ohio, 532; Ellison *v.* Chapman, 7 Blackf. 224.

be the measure of the damages, must depend upon the circumstances of each particular case. No general rule can be laid down, to govern all cases. If the partnership has no specific term fixed for its continuance, in many cases the damages would be merely nominal. If it has such a specific fixed term, the damages must necessarily be of a very uncertain nature and extent. The whole sum agreed for the partnership stock could not be the true rule; for that would be in effect to give one partner the whole capital stock. And, on the other hand, the possible profits of the partnership, if carried on, would not furnish a rule, because of the uncertainty of such profits, and their being to arise *in futuro*, and the injury not being certain at the time of the breach.

§ 666. The remedial justice administered by Courts of Equity is far more complete, extensive, and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner, where no redress whatsoever, or very imperfect redress, could be obtained at law. In the first place, they may decree a specific performance of a contract to enter into a partnership for a specific term of time, (for it would, ordinarily, be useless to enforce one, which might be dissolved instantly, at the will of either party,)[1] and to furnish a share of the capital stock; which a Court of Law is incapable of doing.[2] This remedy,

[1] This qualification (ordinarily) is necessary; for a specific performance may, in some cases, be important to establish rights under a partnership which has no fixed term for its continuance. Mr. Swanston, in his excellent note to Crawshay *v.* Maule, 1 Swanst. R. 511, 512, 513, has clearly shown the propriety of the qualification. See also Birchett *v.* Bolling, 5 Munf. R. 442.

[2] Anon. 2 Ves. 629, 630; Hercy *v.* Birch, 9 Ves. 357; Buxton *v.* Lister, 3 Atk. 385; Hibbert *v.* Hibbert, cited in Collyer on Partn. B. 2, ch. 2,

however, is rarely sought, for the plain reason, that few partnerships can be hoped to be successful, where they begin in mutual distrust, dissatisfaction, or enmity.

§ 667. In like manner, after the commencement, and during the continuance of the partnership, Courts of Equity will, in many cases, interpose to decree a specific performance of other agreements in the articles of partnership. If, for instance, there be an agreement to insert the name of a partner in the firm name, so as to clothe him publicly with all the rights of acting for the partnership; and there be a studied, intentional, prolonged, and continued inattention to the application of the partner to have his name so used and inserted in the firm name; Courts of Equity will grant a specific relief, by an injunction against the use of any other firm name, not including his. But the remedy, in such cases, is strictly confined to cases of studied delay and omission, and relief will not be given for a temporary, accidental, or trivial omission.[1] So, where there is an agreement not to raise money in the name, or on the credit of the firm, for the private use of any one partner; Courts of Equity will, from the manifest danger of injury to the firm, interpose by injunction to stop such an abuse of the credit of the firm.[2] So, where there is an agreement, by the partners, not to engage in any other business, Courts of Equity will act by injunction to enforce it; and, if profits have been made by any partner, in violation of such an agreement, in any other business, the profits

§ 2, p. 197; Crawshay *v.* Maule, 1 Swanst. 511, 512, Mr. Swanston's note; Peacock *v.* Peacock, 16 Ves. 49; Birchett *v.* Bolling, 5 Munf. R. 442.

[1] Marshall *v.* Colman, 2 Jac. & Walk. 266, 269.

[2] Ibid.

will be decreed to belong to the partnership.[1] So, if it is agreed, that, upon the dissolution of a partnership, a certain partnership-book shall belong to one of the partners, and the other shall have a copy of it, Courts of Equity will decree a specific performance.[2]

§ 668. Courts of Equity will even go farther; and, in case of a partnership existing during the pleasure of the parties, with no time fixed for its renunciation, will interfere (as it should seem) to qualify or restrain that renunciation, unless it is done under fair and reasonable circumstances; for, if a sudden dissolution is about to be made, in ill faith, and will work irreparable injury, Courts of Equity will, upon their ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution.[3] And this is in strict conformity to the doctrine of the Civil Law on the same subject. By that law a partnership, without an express agreement for its continuance, may be dissolved by either party, provided the renunciation be *bonâ fide* and reasonable. *Societas coiri potest vel in perpetuum, id est, dum vivunt, vel ad tempus, vel ex tempore, vel sub conditione. Dissociamur renunciatione, morte, capitis minutione, et egestate.*[4] But, then, it is afterwards added; *Diximus, dissensu solvi societatem; hoc ita est, si omnes dissentiunt. Quid ergo, si unus renunciet? Cassius scripsit, eum, qui renun-*

[1] See Somerville *v.* Mackay, 16 Ves. 382, 387, 389.

[2] Lingen *v.* Simpson, 1 Sim. & Stu. 600. For a more full consideration of this subject, see Story on Partnership, § 188 to 190; Id. § 204 to 215; Id. § 221 to 232; Post, § 671; Richardson *v.* Bank of England, 4 Mylne & Craig, R. 165, 172, 173.

[3] See Chavany *v.* Van Sommer, 3 Wooddes. Lect. 416, note; S. C. cited 1 Swanst. R. 511, 512, in a note. See Id. 123; 16 Ves. 49; 17 Ves. 198, 308.

[4] Dig. Lib. 17, tit. 2, l. 1, 4.

ciaverit societati, a se quidem liberare socios suos, se autem ab illis non liberare. Quod utique observandum est, si dolo malo renunciatio facta sit, &c.[1] *Si intempestive renuncietur societati, esse pro socio actionem.*[2] And again, Labeo writes; *Si renunciaverit societati unus ex sociis eo tempore, quo interfuit socii non dirimi societatem, committere eum in pro socio actione.*[3] And, again, in a more general form, it is said; *In societate coëunda, nihil attinet de renunciatione cavere; quia ipso jure societatis intempestiva renunciatio in æstimationem venit.*[4] The same principles are recognized in the countries, which derive their jurisprudence from the Civil Law.[5]

§ 669. In like manner, Courts of Equity will interfere, by way of injunction, to prevent a partner, during the continuation of the partnership, from doing any acts injurious thereto, as by signing or indorsing notes to the injury of the partnership, or by driving away customers, or by violating the rights of the other parties, or his duty to them, even when a dissolution is not necessarily contemplated.[6]

§ 670. These are instances (and others might be mentioned)[7] of the remedial justice of Courts of Equity, in carrying into specific effect the articles of partner-

[1] Dig, Lib. 17, tit. 2, l. 65, § 3.

[2] Dig. Lib. 17, tit. 2, l. 14.

[3] Dig. Lib. 17, tit. 2, l. 65, § 5; Id. l. 17, § 2; 1 Swanst. R. 510, 511, 512, note; Vinn. in Inst. Comm. 680, § 1, 2, 3.

[4] Dig. Lib. 17, tit. 2, l. 17, § 2.

[5] See 2 Bell, Comm. B. 7, ch. 3, n. 1227; Ersk. Inst. B. 3, tit. 3, § 26; 1 Stair's Inst. B. 1, tit. 16, § 4; Pothier, Traité de Société, n. 65, 149, 150, 151.

[6] See Charlton *v.* Poulter, 19 Ves. 148, *n.*; Goodman *v.* Whitcomb, 1 Jac. & Walk. 589; Collyer on Partn. B. 2, ch. 3, § 5; England *v.* Curling, 8 Beavan, R. 129; Hall *v.* Hall, 12 Beavan, 414.

[7] See Collyer on Partn. B. 2, ch. 3, § 5.

ship, where the remedy at law would be wholly illusory or inadequate. But it is not hence to be inferred, that Courts of Equity will, in all cases, interfere to enforce a specific performance of such articles. Where the remedy at law is entirely adequate, no relief will be granted in Equity. And where the stipulation, though not against the policy of the law, yet is an effort to devest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of any disputes, to refer the same to arbitrators, Courts of Equity will not, any more than Courts of Law, interfere to enforce that agreement; but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded, or interfered with by such stipulations, if they were specifically enforced. And at all events, Courts of Justice are presumed to be better capable of administering and enforcing the real rights of the parties, than any mere private arbitrators, as well from their superior knowledge, as their superior means of sifting the controversy to the very bottom.[1]

§ 671. The remedial justice of Courts of Equity is not confined to cases of the nature above stated. They may not only provide for a more effectual settlement of all the accounts of the partnership after a dissolution, but they may take steps for this purpose, which Courts of Law are inadequate to afford. They may, perhaps, interpose, and decree an account, where a dissolution has not taken place, and is not asked for, although ordinarily, they are not inclined to decree an account,

1 Street *v.* Rigby, 6 Ves. 815, 818; Thompson *v.* Charnock, 8 T. R. 139; Waters *v.* Taylor, 15 Ves. 10; Wellington *v.* Mackintosh, 2 Atk. 569.

unless under special circumstances, if there is not an actual or contemplated dissolution, so that all the affairs of the partnership may be wound up.[1]

[1] Forman *v.* Homfray, 2 Ves. &. B. 329; Harrison *v.* Armitage, 4 Madd. R. 113; Russell *v.* Loscombe, 4 Simons, R. 8; Knowles *v.* Haughton, 11 Ves. 168; S. C. Collyer on Part. B. 2, ch. 3, § 3, p. 163, note (*a*); Waters *v.* Taylor, 15 Ves. 15. See Hall *v.* Hall, 3 Eng. Law & Eq. R. 191; Smith *v.* Jeyes, 4 Beavan, 503. Lord Eldon, in Forman *v.* Homfray, (2 V. & Beam. 329) thought, that no account ought to be decreed, unless there is also a prayer for a dissolution. But the then Vice-Chancellor, (Sir John Leach,) in Harrison *v.* Armitage, (4 Madd. R. 113,) thought otherwise. In the later case of Russel *v.* Loscombe, (1 Simons, R. 8,) the present Vice-Chancellor (Sir Lancelot Shadwell) agreed with Lord Eldon, and held the bill demurrable for not praying a dissolution. In Walworth *v.* Holt, 4 Mylne & Craig, 619, 635 to 639, Lord Cottenham reviewed the cases at large, and said, "When it is said, that the Court cannot give relief of this limited kind, it is, I presume, meant, that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company. How far this Court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any thing beyond what is necessary for the decision of this case; but there are strong authorities for holding, that to a bill praying a dissolution, all the partners must be parties; and this bill alleges, that they are so numerous as to make that impossible. The result, therefore, of these two rules would be, — the one binding the Court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it; that the door of this Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show, that such cannot be the law; for, as I have said upon other occasions, I think it the duty of this court to adopt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights, for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to. It is the ground upon which, the Court has in many cases, dispensed with the presence of parties, who would, according to the general practice, have been necessary parties. In Cockburn *v.* Thompson, Lord Eldon says, 'A general rule,

§ 672. But where such dissolution has taken place, an account will not only be decreed, but, if necessary,

established for the convenient administration of justice, must not be adhered to in cases, in which, consistently with practical convenience, it is incapable of application;' and again, 'The difficulty must be overcome upon this principle, that it is better to go as far as possible towards justice, than to deny it altogether.' If, therefore, it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this Court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so; but in this particular case, notwithstanding the opinions to which I have referred, it will be found that there is much more of authority in support of the Equity claimed by this bill, than there is against it. It is true, that the bill does not pray for a dissolution, and that it states the company to be still subsisting; but it does not pray for an account of partnership dealing and transactions, for the purpose of obtaining the share of profits due to the plaintiffs, which seems to be the case contemplated in the opinions to which I have referred; but its object is, to have the common assets realized and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice. But whether the interest of the plaintiffs in right of which they sue arises from such responsibility, or from any other cause, cannot be material, the question being, Whether some partners, having an interest in the application of the partnership property, are entitled on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this Court for that purpose, pending the subsistence of the partnership; and if it shall appear, that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced, against other persons, whether trustees and agents for the company, or strangers being possessed of property of the company, it may be asked, Why the same right of suit should not exist, when the party in possession of such property happens also to be a partner or shareholder. In Chancey *v.* May, the defendants were partners. In the Widows' Case, before Lord Thurlow, cited by Lord Eldon, the bill was on behalf of the plaintiffs and all others in the same interest, and sought to provide funds for a subsisting establishment. In Knowles *v.* Haughton, 11th July, 1805, reported in Vesey, but more fully in Collyer on the Law of Partnership, the bill prayed an account of partnership transactions, and that the partnership might be established; and the decree directed an account of the brokerage business, and to ascertain what, if any thing, was due to the plaintiff in respect thereof; and the Master was to inquire whether the partnership between the plaintiff and the defendant

a manager or receiver will be appointed to close the partnership business, and make sale of the partnership

had at any time, and when, been dissolved; showing that the Court did not consider the dissolution of the partnership as a preliminary necessary, before directing the account. In Cockburn *v.* Thompson, the bill prayed a dissolution; but it was filed by certain proprietors on behalf of themselves and others, and Lord Eldon overruled the objection, that the others were not parties. In Hitchens *v.* Congreve, the bill was on behalf of the plaintiff and the other shareholders, against certain shareholders, who were also directors, not praying a dissolution, but seeking only the repayment to the company of certain funds, alleged to have been improperly abstracted from the partnership property, by the defendants; and Sir Anthony Hart overruled a demurrer, and his decision was affirmed by Lord Lyndhurst. In Walburn *v.* Ingilby, the bill did not pray a dissolution of partnership, and Lord Brougham, in allowing the demurrer upon other grounds, stated that it could not be supported upon the ground of want of parties, because a dissolution was not prayed. In Taylor *v.* Salmon, the suit was by some shareholders, on behalf of themselves and others, against Salmon, also a shareholder, to recover property claimed by the company, which he had appropriated to himself; and the Vice-Chancellor decreed for the plaintiff, which was affirmed on appeal. The bill did not pray a dissolution, and the company was a subsisting and continuing partnership. That case and Hitchens *v.* Congreve, differ from the present in this only, that in those cases the partnerships were flourishing and likely to continue; whereas, in the present, though not dissolved, it is unable to carry on the purposes for which it was formed, an inability to be attributed in part, to the withholding that property, which this bill seeks to recover. So far, this case approximates to those in which the partnership has been dissolved, as to which it is admitted, that this Court exercised its jurisdiction. This case also differs from the two last mentioned cases in this, that the difficulty in which the plaintiffs are placed, and the consequent necessity for the assistance of this Court, is greater in this case;—no reason, certainly, for withholding that assistance. How far the principle upon which these cases have proceeded, is consistent with the doctrine in Russell *v.* Loscome, 'That in occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the Court stands neuter,' will be to be considered if the case should arise. It is not necessary to express any opinion as to that in the present case; but it may be suggested, that the supposed rule, that the Court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases, and to a certain extent, has been supposed to be more generally applicable, than it is upon authority, or ought

property; so that a final distribution may be made of the partnership effects.[1] This a Court of Law is incompetent to do. The accounts are usually directed to be taken (as has been already suggested) before a Master, who examines the parties, if necessary, and requires the production of all the books, papers, and vouchers of the partnership, and he is armed from time to time, by the Court, with all the powers necessary to effectuate the objects of the reference to him. If it is deemed expedient and proper, the Court will restrain the partners from collecting the debts, or disposing of the property of the concern, and will direct the moneys of the firm received by any of them, to be paid into Court. In this way it adapts its remedial authority to the exigencies of each particular case.[2]

to be upon principle. It is, however, certain, that this supposed rule is directly opposed to the decision of Sir J. Leach, in Harrison *v.* Armitage, and Richards *v.* Davies. Having referred to so many cases, in which suits similar to the present have been maintained by some partners on behalf of themselves and others, it is scarcely necessary to say any thing as to the objection for want of parties; and as to the assignees of those shareholders, who have become bankrupts, those assignees are now shareholders in their places, for the purpose of any interest they have in the property of the company; and, as such, are included in the number of those on whose behalf the suit is instituted. A similar objection was raised and overruled in Taylor *v.* Salmon as to the shares of Salmon. Upon the authority of the cases to which I have referred, and of the principle to which I have alluded, if it be necessary to resort to it, I am of opinion, that a demurrer cannot be supported; and the usual order, overruling a demurrer, must be substituted for that pronounced by the Vice-Chancellor." The point must, therefore, be held to be still open for further consideration. See Hall *v.* Hall, 3 Eng. Law & Eq. R. 196; Thomas *v.* Davies, 11 Beavan, 29.

[1] See Crawshay *v.* Maule, 1 Swanst. R. 506, 523; Peacock *v.* Peacock, 16 Ves. 57, 58; Featherstonhaugh *v.* Fenwick, 17 Ves. 298, 308; Crawshay *v.* Collins, 15 Ves. 218; Wilson *v.* Greenwood, 1 Swanst. R. 471; Oliver *v.* Hamilton, 2 Anst. R. 453.

[2] See Collyer on Partnership, B. 2, ch. 3, § 3, and the cases there cited; Foster *v.* Donald, 1 Jac. & Walk. 252, 253.

§ 673. But, perhaps, one of the strongest cases, to illustrate the beneficial operation of the jurisdiction of Courts of Equity in regard to partnership, is their power to dissolve the partnership during the term for which it is stipulated. This is a peculiar remedy which Courts of Common Law are incapable of administering, by the nature of their organization. Such a dissolution may be granted, in the first place, on account of the impracticability of carrying on the undertaking, either at all, or according to the stipulations of the articles.[1] In the next place, it may be granted on account of the insanity, or permanent incapacity, of one of the partners.[2] In the next place, it may be granted on account of the gross misconduct of one or more of the partners,[3] [although the party applying for the dissolution may have committed the first wrong.[4]] But trifling faults and misbehavior, which do not go to the substance of the contract, do not constitute a sufficient ground to justify a decree for a dissolution.[5]

674. There are other considerations, which make a resort to a Court of Equity, instead of a Court of Law, not only a more convenient, but even an indispensable

[1] Baring *v.* Dix, 1 Cox, R. 213; Waters *v.* Taylor, 2 Ves. & B. 299; Barr *v.* Speirs, 2 Bell, Comm. 612, § 1227, note (6).

[2] Waters *v.* Taylor, 2 Ves. & B. 299; Sayer *v.* Bennet, 1 Cox, R. 107; S. C. 1 Montague on Partn. Appx. 18; Collyer on Partn. B. 2, ch. 3, § 3; Pearse *v.* Chamberlain, 2 Ves. 34, 35; Wrexham *v.* Hudleston, 1 Swanst. R. 514, note; Isler *v.* Baker, 6 Humph. 85.

[3] See Marshall *v.* Colman, 2 Jac. & Walk. [266] 300; Goodman *v.* Whitcomb, 1 Jac. & Walk. [569] 594; Chapman *v.* Beach, Id. [573] 591; Norway *v.* Rowe, 19 Ves. 148; Waters *v.* Taylor, 2 Ves. & B. 304; Master *v.* Kirton, 3 Ves. 74; De Berenger *v.* Hammel, 7 Jarman, Convey. 26, cited Collyer on Partn. B. 2, ch. 3, § 3, p. 161; Russell *v.* Loscombe, 4 Simons, R. 8.

[4] Blake *v.* Dorgan, 1 Green, (Iowa,) 537.

[5] Goodman *v.* Whitcomb, 1 Jac. & Walk. [569] 592; Collyer on Partn. B. 2, ch. 3, § 3.

instrument for the purposes of justice. Thus, real estate may be bought and held for the purposes of the partnership, and really be a part of the stock in trade. The conveyance in such a case, may be in the name of one, for the benefit of all the partners; or in the name of all, as tenants in common, or as joint tenants. In case of the death of a partner, by which a dissolution takes place, the real estate may thus become severed at law from the partnership funds, and vest in the surviving partner exclusively, or in the heirs of a deceased partner, in common with the survivor, according to the particular circumstances of the case. In taking an account of the partnership effects at law, it is impossible for the Court, for the benefit of creditors, to bring such real estate into the account; or to direct a sale of it; or to hold it a part of the partnership funds. It must be treated in Courts of Law just as its character is according to the Common Law. But in a Court of Equity, in such a case, the real estate is treated, to all intents and purposes, as a part of the partnership funds, whatever may be the form of the conveyance.[1] For a Court of Equity considers the real estate, to all intents and purposes, as personal estate; and subjects it to all the equitable rights and liens of the partners, which would apply to it, if it were personal estate. And this doctrine not only prevails, as between the partners themselves and their creditors; but, (as it should seem,) as between the representatives of the partners also. So that real estate, held

[1] See Goodburn *v.* Stevens, 5 Gill. 1; Rice *v.* Barnard, 20 Verm. R. 479; Buchan *v.* Sumner, 2 Barb. Ch. R. 165; Washburn *v.* Bank of Bellows Falls, 19 Verm. 278, 292; Day *v.* Perkins, 2 Sandf. Ch. R. 359; Cox *v.* McBurney, 2 Sandf. S. C. R. 561; Averill *v.* Loucks, 6 Barb. S. C. R. 19, 470.

in fee for the partnership, and as a part of its funds, will, upon the death of the partner, belong, in Equity, not to the heirs at law, but to the personal representatives and distributees of the deceased; unless, perhaps, there be a clear and determinate expression of the deceased partner, then it shall go to his heir at law beneficially.[1]

§ 675. The lien, also, of partners upon the whole funds of the partnership, for the balance finally due to them respectively, seems incapable of being enforced in any other manner, than by a Court of Equity, through the instrumentality of a sale. Besides; the creditors of the partnership have the preference to have their debts paid out of the partnership funds, before the private creditors of either of the partners. But this preference is, at law, generally disregarded; in Equity it is worked out through the Equity of the partners over the whole funds.[2] On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing; which also can be accom-

[1] See Collyer on Partn. B. 2, ch. 1, § 1, p. 68 to 76; Lake *v.* Craddock, 3 P. Will. 158; Elliot *v.* Brown, 9 Ves. 597; Thornton *v.* Dixon, 3 Bro. Ch. R. 199 (Belt's edition); Bell *v.* Phyn, 7 Ves. 453; Ripley *v.* Waterworth, 7 Ves. 425; Selkrig *v.* Davies, 2 Dow, R. 242; Townsend *v.* Devaynes, 1 Montague on Partn. Appx. 96 [101]; Gow on Partn. ch. 2, § 1; Randall *v.* Randall, 7 Sim. R. 271; Morris *v.* Kearsley, 2 Younge & Coll. 139; Bligh *v.* Brent, 2 Younge & Coll. 268, 288; Houghton *v.* Houghton, 11 Simons, R. 491; Hoxie *v.* Carr, 1 Sumner, R. 173; Delmonico *v.* Guillaume, 2 Sandford, R. 366.

[2] Twiss *v.* Massey, 1 Atk. 67; Ex parte Cook, P. Will. 500; Ex parte Elter, 3 Ves. 240; Ex parte Clay, 6 Ves. 833; Collyer on Partnership, B. 4, ch. 2, § 1, 2, 3; Campbell *v.* Mullet, 2 Swanst. 574, 575; Ex parte Ruffin, 6 Ves. 125, 126; Gray *v.* Chiswell, 9 Ves. 118; Commercial Bank *v.* Wilkins, 9 Greenl. 28.

plished only by the aid of a Court of Equity; for at law a joint creditor may proceed directly against the separate estate.[1] This is another illustration of the doctrine of marshalling assets, and proceeds upon analogous principles; and it is commonly applied in cases of insolvency, or bankruptcy. There are certain exceptions to the rule, which confirm, rather than abate, its force; as they stand upon peculiar reasons.

§ 676. In like manner, in cases of partnership debts, if one of the partners dies, and the survivor becomes insolvent or bankrupt, the joint creditors have a right to be paid out of the estate of the deceased partner, through the medium of the equities subsisting between the partners.[2] Indeed, a broader principle is now esta-

[1] Ibid.; Dutton *v.* Morrison, 17 Ves. 205 to 210; Tucker *v.* Oxley, 5 Cranch, 34. See Morris *v.* Morris, 4 Gratt. 293; Grosvenor *v.* Austin, 6 Ohio, 103; Murrey *v.* Neil, 8 How. U. S. R. 414; Mason *v.* Bogg, 2 M. & R. 113.

[2] Collyer on Partn. B. 3, ch. 3, § 4; Cowell *v.* Sykes, 2 Russ. R. 191; Campbell *v.* Mullett, 2 Swanst. 574, 575; Ex parte Ruffin, 6 Ves. 125, 126; Ex parte Kendall, 17 Ves. 514, 526, 527; Lane *v.* Williams, 2 Vern. R. 277, 292; Vulliamy *v.* Noble, 3 Meriv. 614, 618; Gray *v.* Chiswell, 9 Ves. 118; Brice's case, 1 Meriv. R. 620; Hamersley *v.* Lambert, 2 Johns. Ch. R. 509, 510; Jenkins *v.* De Groot, 1 Cain. Cas. Err. 122. If the right of the joint creditors is worked out altogether through the Equity of the partners, it seems somewhat difficult to perceive, how the separate estate of a deceased partner, who is a creditor of the firm far beyond all the partnership funds, should, the joint estate being insolvent, be compellable to pay any of the joint debts beyond these funds. Yet Lord Eldon acted upon the ground of the liability of such separate estate, in Gray *v.* Chiswell, 9 Ves. 118. If, on the other hand, the true doctrine be that avowed by Sir William Grant, in the case of Devaynes *v.* Noble, (1 Meriv. R. 529,) afterwards affirmed by Lord Brougham, (2 Russ. & Mylne 495,) that a partnership contract is several, as well as joint; then there seems no ground to make any difference whatsoever, in any case between joint and several creditors, as to payment out of joint or separate assets. See Collyer on Partn. B. 3, ch. 3, § 4, p. 337 to 347; Hamersly *v.* Lambert, 2 Johns. Ch. R. 509, 510. This is now the established doc-

blished; and it is held, that insolvency or bankruptcy is not necessary, in order to justify the creditors of the partnership in resorting to the assets of the deceased partner; and that such creditors may, in the first instance, proceed against the executor or administrator of the deceased partner, leaving him to his remedy over against the surviving partners; though, certainly, the surviving partners, in a suit in Equity, in such a case, would be proper parties, if not necessary parties, to the bill.[1] The doubts, formerly entertained upon this subject, seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and as the joint estate vests in the surviving partner, the joint creditors, upon equitable considerations, ought to resort to the surviving partner before they seek satisfaction from the assets of the deceased partner.[2] The ground of the present doctrine is, that every partnership debt is joint and several; and, in all such cases, resort may primarily be had for the debt to the surviving partners, or to the assets of the deceased partner.[3] Nor is this doctrine confined to cases of partnership, or to cases of a mercantile character. It equally applies to all cases, where there is a joint loan to several persons, not partners, whether it be in the course of mercantile transactions or not; for the debt

trine; Wilkinson *v.* Henderson, 1 Mylne & Keen, 582; Thorpe *v.* Jackson, 2 Younge & Coll. 553, 561, 562; Story on Partn. § 312; Ante, § 162 to 164.

[1] Wilkinson *v.* Henderson, 1 Mylne & Keen, 582; Devaynes *v.* Noble, 2 Russ. & Mylne, 495; Thorpe *v.* Jackson, 2 Younge & Coll. 553; Sleech's case, 1 Meriv. R. 539; Braithwaite *v.* Britain, 1 Keen, R. 219.

[2] Wilkinson *v.* Henderson, 1 Mylne & Keen, 582.

[3] Thorpe *v.* Jackson, 2 Younge & Coll. 553, 561, 562; Sleech's case, 1 Meriv. 539.

will be treated in Equity as joint and several; and in case any of the debtors die, the creditor may have relief out of his assets, without claiming any relief against the surviving joint debtors, or showing that they are unable to pay the debt by reason of their insolvency.[1]

§ 677. In regard to partnership property, another illustration, of a kindred character, involving the necessity of an account, may be put to establish the utility and importance of Equity Jurisdiction. It is well known, that at law, an execution for the separate debt of one of the partners may be levied upon the joint property of the partnership.[2] In such a case, however, the judgment creditor can levy, not the moiety or undivided share of the judgment debtor in the property, as if there were no debts of the partnership, or lien on the same for the balance due to the other partner; but he can levy the interest only of the judgment debtor, if any, in the property, after the payment of all debts and other charges thereon.[3] In short, he can take only the same interest in the property, which the judgment debtor himself would have upon the final settlement of all the accounts of the partnership. When, therefore, the sheriff seizes such property upon an execution, he seizes only such undivided and unascertained interest; and if he sells under the execution, the sale conveys nothing more to the vendee, who thereby becomes a tenant in common, substituted to the rights and interests of the judg-

[1] Ibid.

[2] See Dow *v.* Sayward, 14 N. H. R. 9. Sometimes granted until the interest of such partner in the property is ascertained. Place *v.* Sweetser, 16 Ohio, 142.

[3] West *v.* Skip, 1 Ves. 239; 2 Swanst. 526; Barker *v.* Goodair, 11 Ves. 85; Muir *v.* Leach, 7 Barb. S. C. 341; Dutton *v.* Morrison, 17 Ves. 205, 206, 207; Gow on Partn. ch. 4, § 1, p. 247, 248.

ment debtor in the property seized.[1] In truth, the sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners; for that would be, to place him in a better situation than the partner himself. But it gives him, properly speaking, a right in Equity to call for an account, and thus to entitle himself to the interest of the partner in the property, which shall, upon such settlement, be ascertained to exist.[2] It is obvious, from what has been already stated, how utterly inadequate the means of a Court of Law are to take such an account. And, indeed, under a levy of this sort, it is not easy to perceive, what authority a Court of Law has to interfere at all, to take an account of the partnership transactions; or by what process it can enforce it.[3] In such a case,

[1] West *v.* Skip, 1 Ves. 239; Chapman *v.* Koops, 3 Bos. & Pull. 289; Skip *v.* Harwood, 2 Swanst. R. 586; S. C. cited Cowp. R. 451; Dutton *v.* Morrison, 17 Ves. 205, 206; Heydon *v.* Heydon, 1 Salk. 392; Taylor *v.* Fields, 4 Ves. 396; Fox *v.* Hanbury, Cowp. R. 445; Nicol *v.* Mumford, 4 Johns. Ch. R. 522; In re Wait, 1 Jac. & Walk. 587, 588, 589; Moody *v.* Payne, 2 Johns. Ch. R. 548; Habershon *v.* Blurton, 1 De Gex & Smale, R. 121.

[2] Gow on Partn. ch. 4, § 1, p. 219 to 254; In re Smith, 16 Johns. R. 106; Nicol *v.* Mumford, 4 Johns. Ch. R. 522, 525; S. C. 20 Johns. R. 611; Shaver *v.* White, 6 Munf. R. 110; Murray *v.* Murray, 5 Johns. Ch. R. 70; Marquand *v.* New York Manuf. Co. 17 Johns. R. 525.

[3] See Chapman *v.* Koops, 3 Bos. & Pull. 389; Eddie *v.* Davidson, 2 Doug. R. 650; Waters *v.* Taylor, 2 Ves. & B. 300, 301; Dutton *v.* Morrison, 17 Ves. 205, 206; In re Wait, 1 Jac. & Walk. 585; Habershon *v.* Blurton, 1 De Gex & Smale, 121. — The remarks of Lord Eldon on this point, in Waters *v.* Taylor, (2 Ves. & B. 301,) are very striking and important. "If the Courts of Law," (said he) "have followed Courts of Equity in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold, before it has been ascertained what is the subject of sale and purchase. According to the old law, I mean before Lord Mansfield's time, the sheriff, under an execution against partnership effects, took the undivided share of the debtor, with-

therefore, the proper remedy for the other partners, if nothing is due to the judgment debtor out of the partnership funds, is to file a bill in Equity against the vendee of the sheriff, to have the proper accounts taken.[1]

§ 678. In cases of the seizure of the joint property for the separate debt of one of the partners, a question has arisen, how far a Court of Equity would interfere, upon a bill for an account of the partnership, to restrain the sheriff from a sale, or the vendee of the sheriff from an alienation of the property seized, until the account was taken, and the share of the partner ascertained. Mr. Chancellor Kent has decided, that an injunction for such a purpose ought not to issue to restrain a sale, by the sheriff, upon the ground that no harm is done to the other partners; and the sacrifice, if any, is the loss of the judgment debtor only.[1] But that does not seem a sufficient ground, upon which such an injunction is to be denied. If the debtor partner has, or will have, upon a final adjustment of the accounts, no interest in the partnership funds; and if the other partners have a lien upon the funds, not only for the debts of the partnership, but for the balance ultimately due to them; it

out reference to the partnership account. But a Court of Equity would have set that right, by taking the account, and ascertaining what the sheriff ought to have sold. The Courts of Law, however, have now repeatedly laid down, that they will sell the actual interest of the partner, professing to execute the equities between the parties; but forgetting that a Court of Equity ascertained previously, what was to be sold. How could a Court of Law ascertain what was the interest to be sold, and what the equities depending upon an account of all the concerns of all the partners for years!"

[1] Chapman *v.* Koops, 3 Bos. & Pull. 290; Waters *v.* Taylor, 2 Ves. & B. 300, 301; Taylor *v.* Fields, 4 Ves. 396; Dutton *v.* Morrison, 17 Ves. 205, 206, 207; In re Wait, 1 Jac. & Walk. 588, 589; Gow on Partn. ch. 4, § 1, p. 253, 254.

[2] Moody *v.* Payne, 2 Johns. Ch. R. 548, 549.

may most materially affect their rights, whether a sale takes place or not. For it may be extremely difficult to follow the property into the hands of the various vendees; and their lien may, perhaps, be displaced, or other equities arise, by intermediate *bona fide* sales of the property, by the vendees, to other purchasers without notice; and the partners may have to sustain all the chances of any supervening insolvencies of the immediate vendees.[1] To prevent multiplicity of suits, and irreparable mischiefs, and to insure an unquestionable lien, it would seem perfectly proper, in cases of this sort, to restrain any sale by the sheriff. And, besides, it is also doing some injustice to the judgment debtor, by compelling a sale of his interest under circumstances, in which there must, generally, from its uncertainty and litigious character, be a very great sacrifice to his injury. If he has no right, in such a case, to maintain a bill to save his own interest, it furnishes no ground why the Court should not interfere in his favor through the equities of the other partners. This seems (notwithstanding the doubts suggested by Mr. Chancellor Kent) to be the true result of the English decisions on this subject; which do not distinguish between the case of an assignee of a partner, and that of an executor or administrator of a partner, or of the sheriff, or of an assignee in bankruptcy.[2]

[1] See Skip *v.* Harwood, 2 Swanst. R. 586, 587.

[2] See Taylor *v.* Field, 3 Ves. 396, 397, 398; S. C. 15 Ves. 559, note; Barker *v.* Goodair, 11 Ves. 85, 86, 87; Skip *v.* Harwood, 2 Swanst. R. 586, 587; Franklyn *v.* Thomas, 3 Meriv. 234; Hawkshaw *v.* Perkins, 2 Swanst. 548, 549; Parker *v.* Pistor, 3 Bos. & Pull. 288, 289; Eden on Injunct. 31; Collyer on Part. B. 3, ch. 6, § 10, p. 474 to 478; 1 Madd. Ch. Pr. 112. See also Brewster *v.* Hammet, 4 Connect. R. 540. See also In re Smith, 16 Johns. R. 106, and the Reporter's learned note; Gow on Part. ch. 4, § 1, p. 252.

§ 679. Another illustration of the beneficial result of Equity Jurisdiction, in cases of partnership, may be found in the not uncommon case of two firms dealing with each other, where some or all of the partners in one firm are partners with other persons in the other firm. Upon the technical principles of the Common Law, in such cases, no suit can be maintained at law in regard to any transactions or debts between two firms; for in such suit, all the partners must join, and be joined; and no person can maintain a suit against himself, or against himself and others. The objection is, at law, a complete bar to the action.[1] Nay, even after the death of the partner or partners, belonging to both firms, no action, upon any contract, or mutual dealing, *ex contractu*, is maintainable by the survivors of one firm against those of the other firm; for, in a legal view, there never was any subsisting contract between the firms; as a partner cannot contract with himself.[2]

§ 680. But there is no difficulty in proceeding in Courts of Equity to a final adjustment of all the concerns of both firms, in regard to each other; for, in Equity, it is sufficient, that all parties in interest are before the Court as plaintiffs, or as defendants; and they need not as at law, in such a case, be on the opposite sides of the record. [Thus, if the same person *is a* general partner in two firms, one of which becomes *insolvent*, while indebted to the other, the latter may recover its debt or dividend of the insolvent firm, and the interest of such general partner in the *solvent* firm, may also be reached in Equity by the creditors of the insolvent firm,

1 Bosanquet *v.* Wray, 6 Taunt. 597; S. C. 2 Marsh. 319; Mainwaring *v.* Newman, 2 Bos. & Pull. 120.

2 Ibid.

by a proceeding to account.[1]] In Equity, all contracts and dealings between such firms, of a moral and legal nature, are deemed obligatory, though void at law.[2] Courts of Equity, in all such cases, look behind the form of the transactions to their substance; and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies.

§ 681. Upon similar grounds, one partner cannot, at law, maintain a suit against his copartners, to recover the amount of money, which he has paid for the partnership; since he cannot sue them without suing himself, also, as one of the partnership. And, if one partner, in fraud of the partnership rights or credits, should release an action, that release would, at law, be obligatory upon all the partners. But a Court of Equity would not, under such circumstances, hesitate to relieve the partnership.[3]

§ 682. Courts of Equity, in this respect, act upon principles familiarly recognized in the Civil Law, and in the jurisprudence of those nations which derive their law from that most extensive source. This will abundantly appear, by reference to the known jurisprudence of Scotland, and that of the continental nations of Europe.[4] Indeed, it would be a matter, not merely of curiosity, but of solid instruction, (if this were the proper place for such an examination,) to trace out the strong lines of analogy between the law of Partnership,

[1] Hayes *v.* Bernent, 3 Sandf. R. 394.

[2] Ibid.

[3] Ante, § 504, note; Jones *v.* Yates, 9 B. & Cressw. 532, 538, 539, 540.

[4] See 2 Bell, Com. B. 7, ch. 2, § 2, art. 1214.

as understood in England, and especially as administered in Equity, and that of the Roman Jurisprudence. Unexpected coincidences are everywhere to be found; while the differences are comparatively few; and, for the most part, these arise, rather from the different processes and forms of administering justice in different countries, than from any general diversity of principles.[1] Among other illustrations, we may cite the general doctrine, that the partnership property is first liable to the partnership debts; that the right of any one partner is only to his share of the surplus; that joint creditors have a priority or privilege of payment before separate creditors;[2] and that the estates of deceased partners are liable to contribute towards the payment of the joint debts.[3]

§ 683. This review of some of the more important cases in which Courts of Equity interfere in regard to partnerships, does (unless my judgment greatly misleads me) establish, in the most conclusive manner, the utter inadequacy of Courts of Law to administer justice in most cases growing out of partnerships, and the indispensable necessity of resorting to Courts of Equity, for plain, complete, and adequate redress. Where a discovery, an account, a contribution, an injunction, or a dissolution is sought, in cases of partnership, or even where a due enforcement of partnership rights, and duties, and

[1] To establish this statement, the learned reader may be referred to the Digest, Lib. 17, tit. 2, *Pro Socio*; and Voet, Com. ad id.; Vinnius, Comm. Inst. Lib. 3, tit. 26; 1 Domat, Civil Law, tit. *Partnership*, B. 1, tit. 8, per tot.; 2 Bell, Comm. B. 4, ch. 2, art. 1250 to 1263; Code Civil of France, art. 1832 to 1873; Pothier, Traité de Societé, per tot.

[2] 1 Domat, B. 1, tit. 8, § 3, art. 10.

[3] 1 Domat, B. 1, tit. 8, § 6, art. 1, 2; Pothier de Societé, n. 96, 136, 161, 162.

credits, is required, it is impossible not to perceive, that, generally, a resort to Courts at Law would be little more than a solemn mockery of justice. Hence, it can excite no surprise, that Courts of Equity now exercise a full concurrent jurisdiction with Courts of Law in all matters of partnership; and, indeed, it may be said, that, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complexity or difficulty.

CHAPTER XVI.

MATTERS OF RENT.

§ 684. ANOTHER head of concurrent jurisdiction of the same nature, and resulting also from the imperfection of the remedy at law, is in the case of RENTS. This subject has been already touched in other places;[1] and a few particulars only will be here taken notice of, which have not been already fully discussed. Thus, for instance, in case of a rent seck, if the grantee has never had seisin, and the rent cannot be recovered at law, Courts of Equity will decree a seisin of the rent, and perhaps, also, that it be paid to the party.[2] So, if the deeds are lost, by which a rent is created, so that it is uncertain what kind of rent it was;[3] or if, (as we have seen,) by reason of a confusion of boundaries, or otherwise, the lands, out of which it issues cannot be exactly ascertained, Courts of Equity will, in like manner, interfere.[4] So, if the remedy for the rent has become diffi-

[1] Ante, § 508 to 515.

[2] Francis's Maxims, 6, § 3, p. 25 (edit. 1793); Ferris *v.* Newby, cited 1 Cas. Ch. 147; Palmer *v.* Wettenhal, 1 Cas. Ch. 184; 1 Fonbl. on Equity, B. 1, ch. 3, § 3; Com. Dig. Chancery, 4 N. 1, *Rent;* Thorndike *v.* Collington, 1 Cas. Ch. 79; Web *v.* Web, Moore, R. 626; Davy *v.* Davy, 1 Cas. Ch. 147.

[3] Collet *v.* Jacques, 1 Cas. Ch. 120; Cocks *v.* Foley, 1 Vern. 359; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 518, 519; Holder *v.* Chambury, 3 P. Will. 256; Livingston *v.* Livingston, 4 Johns. Ch. R. 290, 291.

[4] Ante, § 622; 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*f*); Francis's

cult or doubtful at law; or if there is an apparent perplexity and uncertainty as to the title, or as to the extent of the responsibility of the party, from whom it is sought; in all such cases, Courts of Equity will maintain jurisdiction, and upon a due ascertainment of the right, will decree the rent.[1] So, if a rent is devised out of a rectory to a devisee, for which he cannot have any remedy by distress, or otherwise, at law, Courts of Equity will decree him the rent not only in future, but all arrears.[2] So, if a lease of an incorporeal thing is assigned, and the assignee enjoys it, he will be decreed, in Equity, to pay the rent, although not bound at law.[3] So, if an assignee of a term, rendering rent, assigns over, the lessor will be entitled to relief in Equity for the

Maxims, 6, § 3, p. 25 (edit. 1739); Bowman *v.* Yeat, cited 1 Ch. Cas. 145; Davy *v.* Davy, 1 Ch. Cas. 146, 147; Cocks *v.* Foley, 1 Vern. 359; North *v.* Earl of Strafford, 3 P. Will. 148; Holder *v.* Chambury, 3 P. Will. 256; Com. Dig. Chancery, 4 N. 1, *Rent;* Duke of Bridgewater *v.* Edwards, 4 Bro. Parl. Cas. 139; S. C. 6 Bro. Parl. Cas. by Tomlins, 368. As to the ancient remedy for Rents, see 3 Reeves's History of the Law, ch. 21, p. 317 to 320; 3 Black. Comm. 6; Id. 231; 2 Black. Comm. 12; Id. 288; Bacon, Abridg. *Rent*, A. K.

[1] Livingston *v.* Livingston, 4 Johns. Ch. R. 287, 290. In Benson *v.* Baldwyn, (1 Atk. R. 598,) Lord Hardwicke said: "Where a man is entitled to a rent out of lands, and, through process of time the remedy at law is lost, or become very difficult, this Court has interfered and given relief upon the foundation only of payment of the rent for a long time, which bills are called bills founded upon the *solet*. Nay, the Court has gone so far as to give relief, where the nature of the rent (as there are many kinds at law) has not been known, so as to be set forth. But then, all the terre-tenants of the lands, out of which the rent issues, must be brought before the Court, in order for the Court to make a complete decree." See also Collet *v.* Jacques, 1 Ch. Cas. 120.

[2] Com. Dig. Chancery, 4 N. 1, *Rent;* Thorndike *v.* Collington, 1 Ch. Cas. 79.

[3] Com. Dig. Chancery, 4 N. 1, *Rent*, which cites City of London *v.* Richmond, 2 Vern. 423; S. C. 1 Bro. Parl. Cas. 30. [Id. 516, Tomlins's edit.]

rent against the first assignee, so long as he held the land, although he may have no remedy at law for these arrears.[1] So, the executor of a terre-tenant of lands liable for a rent-charge, which the terre-tenant has suffered to be in arrear, will be compellable, in Equity, to pay the same, although the testator was not personally bound for the rent, which was recoverable only by distress; for his personal estate has been augmented by the non-payment.[2] So, a *cestui que trust* of a lease, rendering rent, will, in Equity, be compellable to pay the rent during the time, wherein he has taken the profits, if his trustee (the lessee) has become insolvent.[3] So, although a grantee of a rent shall not have a remedy in Equity merely for the want of a distress; yet, if the want of such distress be caused by the fraud or other default of the tenant, there, he will be relieved in Equity;[4] So, if a rent is settled upon a woman by way of jointure, but she has no power of distress or other remedy at law; payment of the rent will be decreed, in Equity, according to the intent of the conveyance.[5] So, where a person is a guarantee of an entire rent, issuing out of a manor, and there are no demesne lands to distrain on, the rent will be decreed in Equity.[6]

[1] Com. Dig. Chancery, 4 N. 1, *Rent*, which cites Treackle *v.* Coke, 1 Vern. 165; Valliant *v.* Dodemede, 2 Atk. 546, 548; Richmond *v.* City of London, 1 Bro. Parl. Cas. 30 [Id. 516, Tomlins's edit.); S. C. 2 Vern. 422, 423.

[2] Com. Dig. Chancery, 4 N. 1, *Rent*, which cites Eton College *v.* Beauchamp, 1 Cas. Ch. 121.

[3] Clavering *v.* Westley, 3 P. Will. 402.

[4] Com. Dig. Chancery, 4 N. 3, *Rent*; Davy *v.* Davy, 1 Cas. Ch. 114, 147; Ferris *v.* Newby, cited 1 Ch. Cas. 147; Ferrers *v.* Tanner, cited 3 Ch. Cas. 91

[5] Mitf. Eq. Pl. by Jeremy, 115, 116; Plunket *v.* Brereton, 1 Rep. in Chan. 5; Champernoon *v.* Gubbs, 1 Vern. R. 382.

[6] Duke of Leeds *v.* Powell, 1 Ves. 171.

§ 684 *a*. This jurisdiction, in matters of rent, is asserted upon the general principle, that, where there is a right, there ought to be a remedy; and, if the law gives none, it ought to be administered in Equity.[1] This principle is of frequent application in Equity; but still, it is not to be understood as of universal application as its terms seem to import, for there are limitations upon it. An obvious exception is, where a man becomes remediless at law from his own negligence.[2] So, if he should destroy his own remedy to distrain for rent, and debt would not lie for the arrears of rent, he would not be relievable in Equity.[3]

§ 684 *b*. Courts of Equity have, in some cases, carried their remedial justice farther in aid of parties entitled to rent. It is plain enough, that they may well give relief, where a bill for discovery and relief is filed, and the discovery is essential to the plaintiff's case, and the defendant admits the right of the plaintiff to the rent; for, in such a case, the relief may well be held to be consequent upon the discovery.[4] But, where no special ground of this sort has been stated in the bill, and where, upon the circumstances, there might well have been a remedy at law, Courts of Equity have in some cases gone on to decree the rent, when the defendant has by his answer admitted the plaintiff's right, and no exception has been taken to the jurisdiction by demurrer or by answer, but simply at the hearing.[5]

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[1] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*f*), and cases before cited.

[2] Francis's Maxims, 6, § 3, p. 25, (edit. 1739); Vincent *v.* Beverlye, Noy, R. 82; 1 Fonbl. on Equity, B. 1, ch. 3, § 3.

[3] 1 Fonbl. Eq. B. 1, ch. 3, § 3; 1 Roll. Abridg. 375, Pl. 3.

[4] Ante, § 71; Post, § 690, 691, 1483; Story on Eq. Plead. § 311, 312, 314, 315.

[5] Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 518; North *v.*

§ 684 *c*. These latter cases seem to stand upon grounds, which, if not unquestionable, may at least be deemed anomalous. The general doctrine of Courts of Equity certainly is, that, where the party, entitled to rent, has a complete remedy at law, either by an action or by distress, no suit will be entertained in Equity for his relief;[1] and the cases, in which a suit in Equity is commonly entertained, are of the kind above mentioned, namely, such as stand upon some peculiar Equity between the parties; or where the remedy at law is gone without laches; or where it is inadequate or doubtful.[2] It is not enough to show that the remedy in

Earl of Strafford, 3 P. Will. 184; Holder *v.* Chambury, 3 P. Will. 256; Livingston *v.* Livingston, 4 Johns. Ch. R. 287, 291, 292.

[1] Com. Dig. Chancery, 4 N. 3, *Rent;* Palmer *v.* Wettenhal, 1 Cas. Ch. 181; Francis's Maxims, 6, § 3, p. 25, (edit. 1739,) marg. note; Champernoon *v.* Gubbs, 2 Vern. 382; Fairfax *v.* Derby, 2 Vern. 613; Holder *v.* Chambury, 3 P. Will. 256; Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, and Mr. Belt's note, Id. 519; Bouverie *v.* Prentice, 1 Bro. Ch. R. 200.

[2] Ante, § 684. Mr. Fonblanque, in commenting on the case of the Duke of Leeds *v.* New Radnor, 2 Bro. Ch. R. 338, 519, has said: "The case of the Duke of Leeds *v.* Corporation of New Radnor may, in its first impression, be thought to have been relievable at law; for though, for the purpose of making it the subject of equitable jurisdiction, the bill alleged that the lands in question had undergone various alterations in their boundaries, yet the defendants, by their answer, denied that any alteration whatever had taken place in such particulars, and insisted that the plaintiff's remedy was at law. And Lord Kenyon, then Master of the Rolls, appears to have been of such opinion, but he retained the bill for a year. Lord Thurlow, C., however, conceived the legal remedy to be doubtful, and was of opinion, that the defendants having admitted the plaintiff's right, and the bill having been retained, had done away the objection pressed against the jurisdiction of the Court. It may be material to observe, that his Lordship's opinion went upon the grounds of an admission of the right, and the previous retaking of the bill. As to the admission of the right, if it stood alone, that, probably, would not be thought a sufficient circumstance, to give to a Court of Equity cognizance of a matter not properly within its jurisdiction; and, with respect to the

Equity may be more beneficial, if the remedy at law is complete and adequate;[1] or, even to show, that the remedy at law by distress is gone, if there be no fraud or default in the tenant.[2]

§ 685. But, in cases of rent, where Courts of Equity do interfere, they do not grant a remedy beyond what, by analogy to the law, ought to be granted. As, for instance, if an annuity be granted out of a rectory, and charged thereon, and the glebe be worth less per annum than the annuity, Courts of Equity will make the whole rectory, and not merely the glebe, liable for the annuity.[3] But they will not extend the remedy to the tithes, they not being by law liable to a distress.[4] So, if a rent be charged on land only, the party, who comes into possession of it, will not be personally charged with the payment of it, unless there be some fraud on his part to remove the stock, or he do some other thing to evade the right of distress.[5]

§ 686. Before the Statute of Anne (8 Ann. ch. 14)

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bill having been retained for a year, the same circumstance occurred in Ryan *v.* Macmath, 3 Bro. Rep. 15, notwithstanding which the suit was dismissed for want of Equity. See also Curtis *v.* Curtis, 2 Bro. Rep. 620, where this point was very much considered."

[1] Com. Dig. Chancery, 4 N. 3, *Rent;* Attorney-General *v.* Mayor of Coventry, 1 Vern. 713.

[2] Com. Dig. Chancery, 4 N. 3, *Rent;* Davy *v.* Davy, 1 Cas. Ch. 114, 147; Champernoon *v.* Gubbs, 2 Vern. R. 382; Francis's Maxims, 6, § 3, p. 35, (edit. 1739,) marginal note; 1 Fonbl. Eq. B. 1, ch. 3, § 3; Duke of Bolton *v.* Deane, Prec. Ch. 516.

[3] Thorndike *v.* Collington, 1 Cas. Ch. 79; Com. Digest, Chancery, 4 N. 2, *Rent.*

[4] Ibid.; Thorndike *v.* Collington, 1 Cas. Ch. 79; Francis's Maxims, 6, p. 25, (edit. 1739,) in margin.

[5] Ibid.; Palmer *v.* Wettenhal, 1 Cas. Ch. 184; Com. Dig. Chancery, 4 N. 3, *Rent;* 1 Fonbl. Eq. B. 3, ch. 3, § 3, note (*k*); Davy *v.* Davy, 1 Cas. Ch. 144, 145; S. P. 3 Cas. Ch. 91.

it was often necessary to go into a Court of Equity in cases of a rent seck, for a suitable remedy.[1] But that statute, and other subsequent statutes, enable the party, in all cases, whether the rent be a rent service, or a rent seck, or a rent-charge, to distrain or bring his action of debt.[2] The remedy in Equity is, therefore, in a practical sense, narrowed; or, rather, it is less advisable than formerly. Still, however, (as Mr. Fonblanque has properly remarked,) there are cases, in which a resort to a Court of Equity may be salutary, and, perhaps, indispensable; as, where the premises, out of which the rent is payable, are uncertain;[3] or where the time or amount of payment is uncertain; or where (as already hinted) the distress is obstructed or evaded by fraud;[4] or where the rent is issuing out of a thing of an incorporeal nature, as tithes, where no distress can be made;[5] or where a discovery may be necessary; or where an apportionment may be required, in order to attain complete justice.[6]

§ 687. The beneficial effect of this jurisdiction in Equity may be farther illustrated by reference to the doctrine at law in cases of derivative titles under leases. It is well known, that, although a derivative lessee, or under-tenant, is liable to be distrained for rent during his possession; yet, he is not liable to be sued for rent

[1] See 3 Reeves, Hist. of the Law, ch. 21, p. 316 to 320; Litt. § 218.

[2] Stat. 4 Geo. II., ch. 28; 5 Geo. III., ch. 17; 3 Black. Comm. 6; Id. 230 to 233; Bac. Abridg. *Rent*, K. 6.

[3] Benson *v.* Bridwyn, 1 Atk. 588; Ante, § 684; Com. Dig. Chancery, 4 N. 1, *Rent*.

[4] Champernoon *v.* Gibbs, 2 Vern. 382; S. C. Prec. Ch. 126; Ante, § 684, 685.

[5] 1 Fonbl. Eq. B. 1, ch. 3, § 3, note (*g*), and cases there cited.

[6] See North *v.* Earl of Strafford, 3 P. Will. 148, 151; Benson *v.* Baldwyn, 1 Atk. 598; Com. Dig. Chancery, 4 N. 3, *Rent*.

on the covenants of the lease; there being no privity of contract between him and the lessor.[1] But suppose the case to be, that the original lessee is insolvent, and unable to pay the rent; the question would then arise, whether the under-lessee should be permitted to enjoy the profits and possession of the estate, without accounting for the rent to the original lessor. Undoubtedly there would be no remedy at law. But it is understood, that, in such a case, Courts of Equity would relieve the lessor; and would direct a payment of the rent to the lessor, upon a bill making the original lessee, and the under-tenant, parties. For, if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant. And besides; in the eyes of a Court of Equity, the rent seems properly to be a trust or charge upon the estate; and the lessor is bound, at least, in conscience, not to take the profits without a due discharge of the rent out of them.[2]

[1] Halford *v.* Hetch, 1 Doug. R. 183; 1 Fonbl. Eq. B. 1, ch. 3, note (*s*); Com. Dig. Chancery, 4 N. 5, *Rent*.

[2] See Goddard *v.* Keate, 1 Vern. 27; 1 Fonbl. Eq. B. 1, ch. 5, § 5, and note (*g*); Ante, § 681; Com. Dig. Chancery, 4 N. 1, 4 N. 2, *Rent*.